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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 104

MORRIS A. KENT, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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(By appointment of the U. S. Court of Appeals)

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BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 343 F. 2d 247 (1965).

Jurisdiction

The judgment of the U. S. Court of Appeals affirming the judgment of the District Court was entered on October 26, 1964. This Court granted certiorari on May 3, 1965. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

Constitutional and Statutory Provisions Involved

The Fifth Amendment provides in part:

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . "

The Sixth Amendment provides in part:

"In all criminal prosecutions the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

D.C. Code § 11-902 provides:

"Purpose and basic aims.

The purpose of this subchapter is to secure, for each child under its jurisdiction such care and guidance, preferably in his own home, as will serve the child's welfare and the best interests of the state; to conserve and strengthen the child's family ties whenever possible, removing him from the custody of his parents only when his welfare or the safety and protection of the public cannot be adequately safeguarded without such removal; and, when such child is removed from his own family, to secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given by his parents."

D.C. Code § 11-907 provides:

"1. Children.—Except as herein otherwise provided, the court shall have original and exclusive jurisdiction of all cases and in proceedings:

(a) Concerning any child coming within the terms and provisions of this subchapter.

(b) Concerning any person under 21 years of age charged with having violated any law, or violated any ordinance or regulation of the District of Columbia, prior to having become 18 years of age, subject to appropriate statutes of limitation."

A revised section—D.C. Code § 11-1551 (1963) has produced no substantive change.

D.C. Code § 11-912 provides:

"Whenever any officer takes a child into custody, he shall, unless it is impracticable or has been otherwise ordered by the court, accept the written promise of the parent, guardian, or custodian to bring the child to court at the time fixed. Thereupon such child may be released in the custody of a parent, guardian, or custodian. If not so released, such child shall be placed in the custody of a probation officer or other person designated by the court, or taken immediately to the court or to a place of detention provided by the Board of Public Welfare, and the officer taking him shall immediately notify the court and shall file a petition when directed to do so by the court."

A revised section—D.C. Code § 16-2306 (1963) is identical except for mention of the Board of Commissioners instead of Public Welfare.

D.C. Code § 11-914, provides:

"If a child sixteen years of age or older is charged with an offense which would amount to a felony in the case

of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment, the judge may, *after full investigation,* waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult; *or such other court may exercise the powers conferred upon the juvenile court in this Act in conducting and disposing of such case.*" (Emphasis supplied.)

A revised section—D.C. Code § 11-1553 (1963) is substantially identical.

D.C. Code § 11-929(b), provides:

"The records made by officers of the court pursuant to sections 11-908 and 11-924, referred to in this section as social records, shall be withheld from indiscriminate public inspection, except that such records or parts thereof shall be made available by rule of court or special order of court to such persons, governmental and private agencies, and institutions as have a legitimate interest in the protection, welfare, treatment, and rehabilitation of the child, and to any court before which any such child may appear. The judge may also provide by rule or special order that any such person or agency may make or receive copies of such records or parts thereof. No person, agency, or institution which has received records or information under this section may publish or use them for any purpose other than that for which they were received."

A revised section—D.C. Code § 11-1586(b) (1963) is substantially identical.

D.C. Code § 11-929(c), provides:

> "It shall be unlawful for any person or persons to disclose, receive, or make use of, or authorize, knowingly permit, participate in, or acquiesce in the use of any information concerning any juvenile before the court, directly or indirectly derived from the records, papers, files, or communications of the court, or acquired in the course of the performance of official duties."

A revised section—D.C. Code § 11-1586(c) (1963) is substantially identical.[1]

Questions Presented

I. Is Juvenile Court action in contemplation of transfer of a child to adult court for trial for capital crimes subject to due process and, if so, is such child in such Juvenile Court proceedings entitled to:

a. Immunity from protracted incommunicado interrogation and fingerprinting by the police with or without the permission of Juvenile Court authorities;

b. The right through counsel to familiarize himself with social records which are considered by the Juvenile Court as the basis of transfer or "waiver of jurisdiction";

c. A hearing at which such child—if it so requests through counsel—is entitled to present its case against

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[1] We invite the attention of the Court to the fact that a revision of the Juvenile Court Act, not in effect at the time of the petitioner's proceedings in Juvenile Court, was enacted by Congress and became law December 23, 1963, Pub. L. 88-241. This revision has not made any substantial changes affecting the rights of juveniles. See *Appendix B.*

waiver and familiarize itself with the facts which lead the Juvenile Court to consider waiver;

d. Effective assistance of counsel in the Juvenile Court preliminary to waiver?

II. Does a United States District Court have jurisdiction to try a minor on capital charges where the following circumstances appear:

a. Jurisdiction is waived by a Juvenile Court after denial to a minor of the rights hypothesized under I(a), (b), (c) and (d);

b. The District Court declines to conduct any manner of hearing on a motion to dismiss the indictment on that score;

c. The District Court summarily denies the minor an opportunity to be heard on his request that it constitute itself a juvenile court?

III. Does a United States District Court commit plain error affecting the substantial rights of a child, where jurisdiction has been waived by a Juvenile Court, by admitting into evidence and permitting reference to, and comparisons of, fingerprints taken from the child by the police while he was under the exclusive jurisdiction of the Juvenile Court?

IV. Does a United States District Court err when it refuses to grant judgment of acquittal on all counts of the indictment, on the ground of insanity, where there is not sufficient competent evidence to prove beyond a reasonable doubt either (1) that the accused has no mental disease or defect or (2) that, although the accused is defective

or diseased, the said acts were not the product of such mental disease?

V. Does a United States District Court commit plain error affecting the substantial rights of a defendant on trial for his life when it gives the jury the so-called "Allen" or "dynamite" charge before the jury retires to consider its verdict?

Introduction

In the District of Columbia, as in substantial numbers of other American jurisdictions, "exclusive jurisdiction" over children charged with offenses is vested by the legislature in a Juvenile Court. D.C. Code § 11-907 (1951).

The right to "waive jurisdiction" over such minors in restricted cases is vouchsafed to the Juvenile Court here as elsewhere upon the satisfaction of a statutory requirement of "full investigation." D.C. Code § 11-914 (1951).

This case raises the question—it is believed for the first time in this Court—as to whether such waiver proceedings are in fact subject to the constitutional safeguards exemplified by "administrative," "civil," or "criminal" due process of law.

It raises further serious and disturbing questions as to the quality of justice, facing a 16 year old boy, "waived" by a Juvenile Court in a District Court of the United States.

Statement of the Case

Petitioner was indicted and tried on eight counts in a single indictment. The first three counts alleged that on or about June 5, 1961 he committed housebreaking, robbery and rape of one Echols in her home; the 4th and 5th counts alleged that on or about June 12, 1961 he committed housebreaking and robbery of one Palmer in her home; the 6th, 7th and 8th counts alleged that on or about September 2, 1961 he committed housebreaking, robbery, and rape of one Murphy in her home. He was convicted on the three housebreaking and the three robbery counts, and was thereafter sentenced to serve 5 to 15 years on each such count to run consecutively, a total of 30 to 90 years. He was found not guilty by reason of insanity on counts 3 and 8, charging him with rape.

Petitioner was a child aged sixteen at the time of his arrest in the instant case, and had theretofore been a probationer of the Juvenile Court and subject to its care for two years. Although a "marked deterioration of [petitioner's] personality structure . . . and the possibility of petitioner being the victim of mental illness" had been conceded by the Juvenile Court authorities some time after his arrest in instant case, petitioner had never been subjected to mental examination nor afforded psychiatric treatment under the auspices of the Juvenile Court.[1a]

[1a] The quotation is based on part of the Juvenile Court record read into evidence near the conclusion of defendant's case in the trial transcript in District Court T. 628. The reference to the neglect of the petitioner's mental health in Juvenile Court is based on uncontroverted affidavits filed in support of the motion to dismiss indictment in District Court.

Petitioner was arrested about 3:00 P.M. on September 5, 1961. Under District of Columbia law the Juvenile Court had "exclusive jurisdiction" over him.[2] The basis for his arrest was the use of fingerprints taken by the police when he was 14 years old and a ward of Juvenile Court. Instead of being taken to the Juvenile Court or to the Receiving Home for Children or before a probation officer as required by law,[3] he was taken to police headquarters where he was kept until 10:00 P.M. He was interrogated throughout this period by police officers acting in relays.[4] In the light of the trial transcript, it is clear that this period was also utilized to secure additional fingerprints Trial Transcript 198.

Some time after 10:00 P.M. petitioner was brought to the Receiving Home for Children and there placed in solitary confinement. He passed a sleepless night. Early the next morning the Receiving Home released him for further police interrogation at police headquarters. He was again unremittingly interrogated by police officers acting in relays.

Shortly after 2:00 P.M. on September 6, 1961, during this period of police interrogation, counsel was retained by petitioner's mother. Counsel promptly conferred with

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[2] D.C. Code § 11-907 (1951). Revised section D.C. Code § 11-1551 (1963) has produced no substantive change.

[3] D.C. Code § 11-912 (Supp. VIII, 1960). The revised section, not in effect at time of petitioner's case is identical on this point. D.C. Code § 16-2306 (1963).

[4] See uncontroverted affidavit by defense counsel in support of motion to dismiss indictment filed in District Court.

The balance of the statement of the case is founded on the uncontroverted assertions of the motion to dismiss indictment and *all* of the uncontroverted affidavits, filed in support thereof, in District Court, which are part of the unprinted record in this case.

the Social Service Director of the Juvenile Court. Although petitioner was at the time of the conference in the custody of the police undergoing interrogation, his counsel was not informed that petitioner could be found in any place other than the Receiving Home for Children. In point of fact, during that conference, counsel was handed a brochure providing directions as to how to reach the Receiving Home.

Only during what appeared to be an intermission in police interrogation, was petitioner seen and briefly talked with by an official of the Juvenile Court.

The Juvenile Court subsequently declined to grant a motion made by petitioner's counsel to direct the authorities of the Receiving Home for Children to refuse to turn defendant over to the police for further interrogation. A formal objection to the treatment of the defendant was left unanswered. *See motion to dismiss and defense counsel's uncontroverted affidavit in support thereof in District Court.*

Preliminary to waiver, officials of the Juvenile Court did not confer with petitioner's mother for more than five minutes. Petitioner's father was not contacted by the Juvenile Court at any time. The Rev. Martin Davis, the Principal of Mackin High School, the school attended by petitioner, also was not contacted by the authorities of the Juvenile Court either before or after petitioner's arrest. Nor was any member of his staff which included a psychiatric social worker.[5]

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[5] The affidavits annexed to the motion to dismiss the indictment, show that minimal contact had been maintained by Juvenile Court officials with petitioner's mother prior to petitioner's arrest in the instant case and that the mother had never had an opportunity to communicate what she knew about petitioner's bizarre behavior and incontinence.

Petitioner's detention at the Receiving Home extended for almost a full week. At no time during this period was petitioner afforded any arraignment or formal notice as to the cause of his loss of liberty at the hands of the Juvenile Court. He was, however, examined by two psychiatrists and a psychologist at the instance of his counsel. Unlike the police who encountered no bar in securing access to petitioner, one of the psychiatrists was on one occasion refused admission to the Receiving Home; access was later granted to him but too late for him to see petitioner that day.

Before the Juvenile Court, petitioner offered to prove, through appropriate expert testimony, that he was and had been mentally ill for a considerable period of time; that his mental illness had been neglected by the authorities of the Juvenile Court; and that, given adequate treatment in a hospital setting, *he was a fit subject for rehabilitation under the aegis of the Juvenile Court. Ibid.*

An uncontroverted affidavit of one of the psychiatrists submitted to the Juvenile Court in support of the motion, informed the Court:

> "It is my professional opinion that the respondent [petitioner] is a victim of severe psychopathology and that a complete investigation of the psychological and social factors of his case is impossible without placing him in a hospital situation for psychiatric observation." *Ibid.*

That psychiatrist further offered to recommend a treatment situation to the Juvenile Court which would permit the continued handling of petitioner by the Juvenile Court without endangering the public. The Juvenile Court, how-

ever, sought no information from that psychiatrist. *Ibid.*; see also affidavit of Dr. Leon Salzman filed in support of the motion to dismiss.

Petitioner's counsel at that time moved the Juvenile Court (1) to "transfer . . . [petitioner] immediately to the District of Columbia General Hospital Psychiatric Division for appropriate psychiatric observation," (2) to "disclose its Social Service File to . . . [petitioner's] counsel," and (3) to hold "a hearing . . . immediately after the termination of the period of hospitalization, if waiver of jurisdiction of this case [was] . . . contemplated, as a condition precedent to any valid waiver." Petitioner's counsel further and formally informed the Juvenile Court that "adequate psychiatric facilities in the handling of . . . [petitioner were] available to the Juvenile Court in the District of Columbia General Hospital, which [had] an in-patient department specializing in the care of children and of adolescents." Petitioner's counsel further requested that "the Social Service file should be made available" to him; *that without it he was unable "to study the data upon which a judicial decision as to waiver* [would] be based"; and that if he was "denied access to the Social Service file and, particularly, to the psychological test results, which, if disclosed, he . . . [intended] to submit to the scrutiny of appropriate experts available to him, . . . [petitioner would] be denied effective assistance of counsel." See *motion to dismiss indictment and defense counsel's uncontroverted affidavit in support thereof filed in the District Court.* The files in the Juvenile Court are of course subject to independent judicial notice by this Court.[6] (Emphasis supplied.)

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[6] The facts as thus stated—subject to ready verification by this Court—appear in patent conflict with the view expressed by

The Juvenile Court never passed upon the motion. Petitioner's counsel was never heard upon the motion. Indeed, petitioner's counsel was never afforded, during any part of the proceedings, any audience by the judge of the Juvenile Court, either formal or informal, in chambers or in court. Nor did the Juvenile Court request any additional information of the two psychiatrists and the psychologist who had examined petitioner, or of petitioner's counsel. While the record of this case shows that upon last minute evaluation before waiver, the Juvenile Court noted its awareness of the fact that petitioner was a probable victim of mental illness, it also shows that the Juvenile Court had no knowledge of what mental illness it was that petitioner was probably suffering from and that it had at no time investigated the question as to whether the petitioner's mental illness was amenable to treatment and control under the aegis of a Juvenile Court disposition or whether in fact petitioner was mentally competent to assist counsel in his opposition to waiver. Certainly petitioner's expert witnesses had no clear opinions as to the latter issue.

Without any opinion or other statement of reasons, the Juvenile Court, on September 12, 1961, entered an order stating that, "after full investigation, I do hereby waive jurisdiction over the following offenses, which would amount to felonies if committed by an adult, charged against MORRIS ALLEN KENT, JR., born October 20, 1944, of

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Bazelon, C. J. in *Watkins* v. *United States*, 343 F. 2d 278, 282 n. 9 (D.C. Cir. 1964), to the effect that counsel's *central* purpose in Juvenile Court was to secure the social records for independent medical assessment. Affirmance of petitioner's case by the Court of Appeals in *Kent* v. *United States*, 343 F. 2d 247 (D. C. Cir. 1964) is thus squarely in conflict with *Watkins* v. *United States*, 343 F. 2d 278 (D.C. Cir. 1964) decided by a different panel of the same Court of Appeals within weeks of the *Kent* decision.

1823 S Street, N. W., in the District of Columbia . . . [enumerating the charges], and I do hereby order said child held for trial for such offenses under the regular procedure of the U. S. District Court for the District of Columbia." *Ibid.*

The waiver of petitioner, a 16-year-old child suffering from lapses of bowel control according to all of the experts who were ever to examine him, was entered pursuant to *Policy Memorandum* No. 7 of the Juvenile Court issued on November 30, 1959 and including among its criteria of waiver such considerations as:

"1—The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.

. . . .

"4—The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).

. . . .

"6—The sophistication and maturity of the juvenile as determined by consideration of his home environmental situation, emotional attitude and pattern of living.

. . . .

"8—The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court."[7]

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[7] The policy memorandum was the subject of judicial notice and consideration by the Court of Appeals below. See *Kent* v. *United States, supra.*

Thereafter, petitioner filed a habeas corpus petition in the District Court, asserting that, since the Juvenile Court had never properly divested itself of jurisdiction of his case, the District Court had not acquired jurisdiction thereover. More specifically, the petitioner asserted in his habeas corpus petition that the Juvenile Court had deprived him of due process of law and had not accorded him the "full investigation" which was the prerequisite to waiver under D.C. statute.

Simultaneously petitioner, proceeding on the self-same ground also noted a direct appeal from the Juvenile Court order of waiver to the then Municipal Court of Appeals.

Both the dismissal of the habeas corpus petition and the affirmance of the Juvenile Court order of waiver were appealed, the former several days before the return against petitioner of an indictment charging him with the 8 counts of rape, robbery and housebreaking, previously set forth.

On January 22, 1960, the Court of Appeals held in the companion cases of *Kent* v. *Reid* and *Kent* v. *District of Columbia*, 316 F. 2d 331 (D.C. Cir. 1963) that *habeas corpus* did not lie and was "unnecessary to preserve [petitioner's] . . . rights [and] would interfere with and unnecessarily delay the orderly processes of the District Court" and that, moreover, the Juvenile Court order of waiver was not appealable. *Ibid.*

Significantly the Court went on to declare that proceedings to determine whether "full investigation" was made by the Juvenile Court were available upon a motion to dismiss the indictment in the District Court "if sufficient allegations . . . [were] made." *Ibid.*

It went on to declare that petitioner was also free to request the District Court to constitute itself a Juvenile

Court for his case. [*Ibid.*] The Court of Appeals thereafter declared that in the event that petitioner's motions should be denied by the District Court, the District Court order denying said motions "would be reviewable by this Court [i.e., the Court of Appeals] in the event [petitioner] is ultimately convicted." *Ibid.*

Prior to the Court of Appeals decision on *Kent* v. *Reid, supra,* and *Kent* v. *District of Columbia, supra,* petitioner had in fact filed a motion to dismiss the indictment in the District Court. The motion asserted that the order of the Juvenile Court, waiving jurisdiction, was invalid and hence incapable of conferring jurisdiction on the District Court under the regular procedure governing the trial of adults. The invalidity of the Juvenile Court order, the motion went on to assert, inhered in denying the petitioner fundamental fairness as secured by the due process clause of the Fifth Amendment, the right of effective assistance of counsel as secured by the Sixth, and in further denying petitioner the right as secured by D.C. Code § 11-914 (1951) of "full investigation." [7a]

The grounds set forth for the invalidity of the order in the motion to dismiss were, in sum, the same as those contained in the habeas corpus petition and the direct appeal from the Juvenile Court order.

The motion prayed that the "indictment be dismissed and the case remanded to the Juvenile Court *unless* [the District] . . . *Court wishes to assume jurisdiction as a Juvenile Court in this case.*" (Emphasis supplied.)

It was supported by the uncontroverted affidavits by petitioner's parents, setting forth data, exemplifying petition-

[7a] Revised D.C. Code § 11-1553 (1963) has produced no substantive change.

er's disturbed behavior, beginning early in childhood and continuing to the present, including disorientation, auditory hallucinations and lack of bowel control and asserting that such data were never communicated to the Juvenile Court authorities. It was further supported by the uncontroverted affidavits of petitioner's school principal and guidance counselor, setting forth further data in exemplification of petitioner's disturbed behavior in the school setting and asserting alike that such data were never communicated to the Juvenile Court because that Court had not made contact with the school authorities. It was further supported by the uncontroverted affidavit of Dr. Leon Salzman, a psychiatrist, who had examined petitioner at the behest of petitioner's counsel while petitioner was detained in the Juvenile Receiving Home. Dr. Salzman asserted that petitioner was a victim of grave psychopathology the exact nature of which should be studied in a hospital setting, that petitioner might be amenable to treatment and restoration to society within the framework of the Juvenile Court and that he, Dr. Salzman, had offered to recommend a treatment situation to the Juvenile Court but that his offer had been spurned. It was further supported by the uncontroverted affidavit of petitioner's counsel as to petitioner's arrest, interrogation and detention, as previously set forth, under Juvenile Court auspices, as to his failure to be heard by the Juvenile Court—either formally or informally—as to petitioner's illness, the neglect of that illness by Juvenile Court, and the prospects of petitioner's rehabilitation under Juvenile Court auspices, as to his failure to secure the social service records in Juvenile Court in an attempt at demonstrating the impropriety of waiver, and as to his failure to secure petitioner's hospitalization prior to waiver by the Juvenile Court. See *counsel's uncontroverted affidavit. Supra.*

While in District Court petitioner filed a further motion for hospitalization. See *unprinted record of the case.*

The motion to dismiss the indictment for failure to accord petitioner due process and a full investigation in Juvenile Court was summarily denied by the District Court and a proffer of testimony of former counsel, relatives and school authorities based upon the affidavits filed in support of that motion spurned likewise. In sum, the District Court did not even pause to conduct a hearing, however short, as to the allegations of denials of constitutional and statutory rights made in this case. *Transcript of Proceedings Before Chief Judge McGuire,* Feb. 8, 1963, pp. 16-21.

An oral motion founded upon the motion to dismiss, requesting the District Court "to constitute itself a Juvenile Court" was further summarily denied by the Chief Judge of the District Court "with emphasis". *Transcript of Proceedings Before Chief Judge McGuire,* Feb. 5, 1963, p. 16 and Feb. 8, 1963, p. 21.

While refusing to accord petitioner any opportunity to be heard on the denial of his rights in Juvenile Court and refusing to permit the payment of petitioner's expert witnesses anything beyond the nominal witness fee, the District Court Judge, passing on the motions declared that it "had a suspicion . . . that this [presumably the entry into the case of psychiatric experts outside the ranks of the D.C. General and St. Elizabeth's hospitals was] . . . a stimulated activity, and [he, i.e., the judge was] concerned about the activities of the National Institute of Health and the Washington School of Psychiatry . . . [and] if that . . . [was] so, somebody . . . [was] going to get in serious trouble." *Proceedings Before Chief Judge McGuire,* Feb. 18, 1963, p. 26. The judge thereupon directed petitioner's counsel

to "advise" the District Court "by the end of the week" about the activities of the suspect Washington School of Psychiatry (*Id.*, pp. 28-29) which had furnished petitioner with some of his prospective expert witnesses.

One such expert was referred to at that time by the prosecuting counsel, without any manner of reproof by the District Court, as "*that* Goshen from West Virginia, *that* Dr. Goshen, I mean . . . , hooked up with *that* Washington School of Psychiatry . . ." (*Id.*, 27-28). (Emphasis supplied.)

The motion for mental examination at the D.C. General Hospital, however, was granted. Unwilling to accept the evaluation of the D.C. General Hospital staff, the prosecution had insisted upon inclusion within the court order directing such mental examination, the statement that the hospital was to afford prosecution psychiatrists, outside of the hospital staff, access to the petitioner.

When the D.C. General Hospital reported that it found petitioner to be a victim of schizophrenia and his crimes, if any, the probable products of his illness and pronounced petitioner *mentally incompetent* to stand trial, the Government objected to the D.C. General report and the District Court, acting *sua sponte* committed petitioner for further examination at St. Elizabeth's. St. Elizabeth's Hospital in turn certified petitioner as competent to stand trial but expressed the firm opinion that the petitioner was schizophrenic and his crimes, if any, the products of his disease. See unprinted record of District Court orders.

At this stage not one, but two government hospitals had pronounced petitioner schizophrenic and his crimes, if any, a product of his mental disease.

A motion for a judicial determination of petitioner's competency to stand trial resulted in a hearing in District Court. While the prosecution succeeded in securing last-minute psychiatric examination of petitioner in the District Jail by staff members of St. Elizabeth's Hospital, the defense did not succeed in obtaining a court order for a further examination by members of the staff of the D.C. General Hospital. A defense psychiatrist, Dr. Warren C. Johnson, attempted to see petitioner in the District Jail to bring his findings up to date after the petitioner's transfer to the District Jail from St. Elizabeth's Hospital. He was squarely informed by the jail authorities that he would not be admitted to the Jail to examine his patient. *Affidavit of Dr. Warren C. Johnson in District Court.*

At the competency hearing, one St. Elizabeth's psychiatrist testified in conclusory terms that petitioner was competent to stand trial although he admitted that petitioner's recollection of events touching the period of the indictment appeared defective (he suggested but at no time claimed that petitioner might be malingering to some extent); another testified in similarly conclusory terms that petitioner was competent but that he had no problems with his recollection, while petitioner's counsel himself testified that he had never succeeded in maintaining rational communication with his client.[8]

The District Court declared that in its "opinion, the question of competency to stand trial is primarily a medical question." Addressing itself to defense counsel, it then declared as follows:

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[8] The record contains the affidavits of two counsel for the defense in advance of trial in addition to the testimony of the trial counsel for the defense that rational communication with the petitioner was impossible.

"I have before me the testimony of Doctor Owens and Doctor Platkin . . . in whose professional standing, ability and competency I have great faith and great confidence.

"Of course, I have no question but what you tell me is true, but I think that with you this defendant may well be malingering."

It then adjudged the defendant competent to stand trial. *Transcript of Proceedings Before Judge Hart,* March 7, 1963.

The case proceeded to trial by a jury on March 14, 1963. Prior to the opening statement of the prosecutor, the trial Court sustained a motion to suppress the evidence seized from petitioner and from his home. The prosecutor declared that his confession was not to be offered in evidence (T. 16).

The prosecution called 17 witnesses. The two alleged rape victims, Juanita Echols and Mary Murphy both testified that they were awakened in the early hours of the morning, raped and robbed. Only Murphy identified petitioner as the assailant. The prosecutor later volunteered to the Court that Echols had identified another person, not petitioner, from a photograph as the intruder, but could not identify that person when seen in a lineup (T. 213). Witnesses were called whose testimony tended to show that Echols had had intercourse with a male on the date of the alleged assault. Also, witnesses were called who identified fingerprints taken from the dwellings of both alleged victims as being identical to fingerprints taken from petitioner after his arrest (T. 91-92; 206).

Also called as a witness by the prosecution was Gloria Palmer (T. 96) who testified that she was awakened early

in the morning in her apartment, which was shared by her room mate who did not testify, by a hand over her mouth. She testified that when she screamed the alleged intruder went out the door. However, she was not able to identify petitioner as the alleged intruder. She claimed that she subsequently discovered that her wallet containing $47.00 was missing. Another witness for the prosecution testified that he took fingerprints from Palmer's apartment and when compared to petitioner's fingerprints they were similar (T. 11).

When the prosecution rested its case counsel for petitioner moved for judgments of acquittal on all counts in the indictment. This motion was denied (T. 215).

The case for the defense was presented through the testimony of four lay witnesses and twelve expert witnesses. The lay witnesses consisted of petitioner's mother, uncle and two aunts. The expert witnesses consisted of five psychiatrists, four psychologists, and one psychiatric social worker. The testimony of two additional psychiatrists was put in the record by stipulation.

All of the lay witnesses testified that from their observations, petitioner's conduct was highly abnormal, that it was manifested by strange and bizarre acts, and that this seemed to intensify. Petitioner's mother testified that when petitioner was very young he had seen his father attempting to choke her to death and that subsequent to that event petitioner had become nervous, his behavior changed, and "he would be in a trance" (T. 220). Petitioner's mother also testified that petitioner was extremely frightened of his father, and this in turn was corroborated by the other lay witnesses.

Drawn from the two public psychiatric institutions as well as private practice, all psychiatrists and psychologists produced by the defense, asserted that petitioner was the victim of a schizophrenic mental illness and that his crimes, if any, were produced by it. The psychiatric social worker restricted his testimony to the observation that he had seen petitioner in his school environment and that in his view petitioner had needed psychiatric help. See *Appendix A* for more detail.

On rebuttal, prosecuting counsel called a psychiatric expert from a public institution. The latter testified that petitioner was a victim of a schizophrenic mental illness. In his attempts at "rebutting productivity," prosecuting counsel asked the witness a number of hypothetical questions, using assumptions not supported by the record. The witness replied to all of them—to some in terms of suggestions of the improbability that the disease produced the crimes charged in the indictment. See *Appendix A* for more detail.

Another expert witness summoned by the prosecuting counsel was in private practice and testified that in his view petitioner had a "schizoid personality" and that this term did not represent a disease. Asked as to whether petitioner was "normal," he replied: "I hope I haven't given that impression" (T. 704). See *Appendix A* for more detail.

Both sides then rested their case. The defense renewed its motion for judgment of acquittal. The Court denied it (T. 730).

Arguments to the jury included inflammatory castigation of defense psychiatrists by the prosecuting counsel (T. 743-745, 764-766).

On two separate occasions moreover prosecuting counsel argued that the evidence showed that the alleged robberies were committed before the alleged assaults (T. 740-741, 762). This was not based upon the facts disclosed in the record.

The Court thereupon charged the jury (T. 776-820). In that charge, before the jury retired to consider its verdict, the Court gave this version of the Allen or "dynamite charge":

> "You have before you all of the evidence which the Government and the defendant can offer in this case. The verdict which you return to the courtroom should represent your individual opinions. In other words, each of you must arrive at your own verdict; but this does not mean that your views, your opinions may not be changed by conference in the jury room. The object of the jury system is to secure a unanimous verdict by comparison of views and by arguments and by discussion among the jurors themselves. Each of you should listen with deference to the arguments of the other jurors and with a distrust of your own judgment if you find that a large majority of the jurors take a different view of the case than that which you yourself take.
>
> None of you should go into the jury room with a blind determination that the verdict should represent your opinion of the case at the moment you leave the courtroom, or that you should close your ears to the arguments of other jurors who are equally honest and equally intelligent with yourself. Accordingly, although the verdict must be the verdict of each of you individually and not a mere acquiescence in the conclusion of your fellow jurors, the Court instructs you that you

should examine the issues submitted with candor and with a proper regard and deference to the opinions of each other. It is your duty to decide this case if you can conscientiously do so. You should listen to each other's arguments with a disposition to be convinced.

If in any question put to you for a vote by your foreman, any one of you should find that you are a very pronounced minority on any question, you should appraise your situation. You should ask yourself, Why did this evidence make such an impression on me when it didn't make a similar impression on a great number of other jurors who are equally honest and equally intelligent with myself?

I repeat, your verdict must be a unanimous one. It must represent your individual view of the case, but you should not solidify your judgment in the case until you have had an opportunity to listen with an open mind to the discussion of all of the other jurors in the jury room" (T. 815-816).

As previously noted, petitioner was convicted of housebreaking and robbery and accorded an insanity acquittal on the counts of rape. He was sentenced to serve 30 to 90 years in prison, the time to be spent at St. Elizabeth's Hospital on the mandatory commitment after the insanity acquittal, i.e., until such time as he recovered his sanity, to be counted as part of the 30 to 90 years sentence.

The U. S. Court of Appeals for the District of Columbia Circuit affirmed through McGowan, *J.*, *Kent* v. *United States*, 343 F. 2d 247 (D.C. Cir. 1964). A concurring opinion by Washington, *J.*, declared that it was "a fair inference from the record . . . that one of the reasons why

the Juvenile Court waived jurisdiction was because . . . [petitioner] was seriously disturbed and the Juvenile Court lacked facilities to adequately treat him." *Id.*, 262.

Summary of Argument

I

Juvenile Court action directed against a delinquent boy or girl is fraught with significant deprivation—indistinguishable from punishment—particularly in the absence of adequate resources. Fairness requires "that there shall be no greater diminution of the rights of a child, as safeguarded by the Constitution, than should be suffered by an adult charged with an offense equivalent to the alleged act of delinquency of the child." Of all sanctions meted out by the Juvenile Court, the most "critically important . . . for the child" is waiver of Juvenile Court jurisdiction and the transfer of that child to adult court for trial under adult procedure.

Proceedings leading to waiver should therefore be subject to constitutional safeguards of fundamental fairness, commensurate with the gravity of the situation, and include a settled procedure for the apprehension and detention of the child. A hearing satisfying the minimal requirements of fairness of administrative due process in adversary matters and effective assistance of counsel is therefore essential. So is freedom from coercive interrogation.

This had been denied the petitioner.

II

The police practices engaged ostensibly under the aegis of the Juvenile Court in this case and including the protracted incommunicado interrogation of petitioner at police headquarters and the subsequent denial to petitioner by the Juvenile Court of hospitalization for his mental illness and of an opportunity of explaining or refuting secret evidence relied on by that Juvenile Court in its decision to waive jurisdiction violated the D.C. statutory scheme and was thus incapable of conferring jurisdiction on the District Court.

III

The District Court compounded existing prejudice by admitting in evidence products of lawlessness in law enforcement. The District Court further erred in denying a motion for judgment of acquittal by reason of insanity in the light of the evidence in this case.

ARGUMENT

I.

The Juvenile Court Action in General and Proceedings Leading to Waiver of Jurisdiction by the Juvenile Court in Particular Are Subject to Requirements of Due Process.

Taking a child from his home "to a building with white-washed walls, regimented routine and institutional hours,"[9] until he reaches his majority, subjecting him to the restrictions of probationary discipline for a like period, or confining him in an overcrowded "Receiving Home" pending an investigation of evidence pointing to his "involvement" in capital or other serious crime—and then transferring him to adult court to stand trial under adult procedures and thereby exposing him—if convicted—to adult punishment[10] is characteristic action taken in Juvenile Courts throughout the country.

Although technically engaged in adjudication of "status" rather than "crime", Juvenile Courts inflict punishment in all of the examples cited above. Designation of their proceedings as "civil" rather than "criminal"[11] in no way detracts from the consequences of Juvenile Court action in terms of the pain suffered by stigmatization as a juvenile delinquent, by loss of liberty or by exposure to adult punishment. The latter is perhaps the most "awesome decision" confronting the Juvenile Court—"a critically important

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[9] The language is that of dissent but the description one of operative fact. See Musmanno, J., in *Holmes Appeal,* 379 Pa. 599, at 616, 109 A. 2d 523, 530 (1954).

[11] See e.g., Standard Juvenile Court Act, Sec. 1 (1959).

[10] See the facts of the instant case.

[act] for the child who may be abandoned as 'incorrigible' and for the society which has thus abandoned the child," [12] a "critical stage" of the proceeding as it is viewed from the perspective of ultimate trial in the adult court.[13]

Notwithstanding "unsettled and conflicting views" [14] "the trend in recent decisions", it may be observed, "is to hold that there shall be no greater diminution of the rights of a child, as safeguarded by the Constitution, than should be suffered by an adult charged with an offense equivalent to the alleged act of delinquency of the child." [15] In this light it does not seem inappropriate to view the Juvenile Court waiver as at least "a judicial finding of probable cause to believe the accused guilty" or in other words, "the finding of a magistrate in a proceeding under Rule 5, Fed. R. Crim. P., that there is probable cause to believe the defendant guilty of the crime charged against him" [16] i.e., as an act affecting liberty and requiring fundamental safeguards.

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[12] Bazelon, C.J., in *Watkins* v. *United States*, 343 F. 2d 278, 282 (D.C. Cir. 1964).

[13] Certainly it is as critical in the light of the facts of this case as the arraignment in Alabama or the preliminary examination in Maryland, respectively reviewed by this Court in *Hamilton* v. *Alabama*, 368 U.S. 52 (1961) and *White* v. *Maryland*, 373 U.S. 59 (1963).

[14] See Anno. 151 A.L.R. 1229.

[15] *Application for Johnson*, 178 F. Supp. 155, 160 (D.N.J. 1957). "[A] number of cases [which] have held that a juvenile is entitled to fundamental due process of law" have been listed by the Superior Court of Delaware, New Castle, in *Application of Naylor*, —— Del. ——, 207 A. 2d 1, 10 (1965) as follows: *In re Alexander*, 152 Cal. App. 2d 458, 313 p. 2d 182, 184 (1957); *In re Contreras*, 109 Cal. App. 2d 787, 241 p. 2d 631, 633 (1952); *Brewer* v. *Commonwealth (Ky.)*, 283 S.W. 2d 702, 703 (1955); *Cullins* v. *Williams*, 156 Ky. 57, 160 S.W. 733, 734 (1913).

[16] Bazelon, *J.*, for the Court in *Green* v. *United States*, 308 F. 2d 303 (D.C. Cir. 1962).

In divesting the child of the safeguards secured to it under the "exclusive jurisdiction" of the Juvenile Court, "waiver" is patently a penalty—in fact—the supreme penalty of the Juvenile Court.

It is understatement to suggest that the rights involved in proceedings of "waiver" are at least on a par with the rights involved in administrative adjudication affecting property. In the latter context, it is commonplace to note, that "[the] granting of a fair trial is the one *sine qua non* of administrative procedure. It is the one fixed criterion of judicial review." COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS 149 (1951).

II.

The Petitioner Was Denied Due Process in the Proceedings in Juvenile Court Leading to Waiver of Juvenile Court Jurisdiction.

A. Petitioner was subjected to illegal arrest, detention, and coercive interrogation under Juvenile Court auspices. The net effect of these practices was not only the use of the petitioner as "the deluded instrument of his own conviction" [17] *but a shocking misuse of official power.*

The arrest and detention of the petitioner by the police were violative of District of Columbia law. D.C. Code § 11-912 (Supp. VIII, 1960).[17a] His interrogation—conducted in relays—was inherently coercive.

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[17] HAWKINS, PLEAS OF THE CROWN 595 (8th Ed. 1824).

[17a] The revised section, D.C. Code § 16-2306 (1963) has produced no substantive change.

Upon his placement in the "Receiving Home" after the first day of interrogation by the police, petitioner was placed in solitary confinement. He was returned to police headquarters after a sleepless night to undergo a second day of sustained interrogation.

During two days of interrogation at police headquarters petitioner, an adolescent victim of mental illness, was thus without counsel. As a consequence of such lack of assistance he furnished evidence against himself. It must be reiterated in this context that when counsel was retained for petitioner in the Juvenile Court during the second day of petitioner's interrogation at police headquarters, counsel was not informed that his client could be found in any place other than the Receiving Home for Children by the Social Service Director of the Juvenile Court who, in fact, handed him a brochure providing directions as to how to reach the Receiving Home. A "confession" was extracted from petitioner during this period of interrogation. While the "confession" itself was not offered in evidence, much of the prosecution cross-examination of defense psychiatrists at the time of the petitioner's trial suggests knowledge of data obtainable within that "confession" alone. It was also during this period that petitioner submitted to fingerprinting at police headquarters. These fingerprints were ultimately used against him in the District Court.

It is clear that petitioner's interrogation had turned accusatory long before the confession and corroborating data were obtained. Petitioner's right to assistance of counsel at that stage was surely not inferior to that of an adult, not suffering from mental illness. Cf. *Escobedo* v. *Illinois,* 378 U.S. 478 (1964). Yet that right was denied.

Independently of the violation of petitioner's various rights, as thus set forth, the totality of circumstances affect-

ing the petitioner's arrest, detention, interrogation, etc., presents a shocking misuse of official power vis-à-vis a child and a victim of mental illness. Cf. *Rochin* v. *California,* 342 U.S. 165 (1952); *Blackburn* v. *Alabama,* 361 U.S. 199 (1960); *Mapp* v. *Ohio,* 367 U.S. 743 (1961).

B. *Petitioner was waived by the Juvenile Court on the basis of "evidence"—withheld from the petitioner and his counsel—without a hearing, formal or informal—without a determination of his mental competency to participate in waiver proceedings and as a consequence of all of this without effective assistance of counsel.*

(1) *Secret Evidence.*

Petitioner demanded—but did not secure—the social records—clearly a determining factor—if not the outright basis of the decision of the Juvenile Court to waive jurisdiction. See *Kent* v. *United States,* 343 F. 2d 278 (D.C. Cir. 1964). As expressed by Bazelon, *C.J.,* for another panel of his Court:

> "All of the social records concerning the child are usually relevant to waiver since the Juvenile Court must be deemed to consider the entire history of the child in determining waiver. . . . Since an attorney has no certain knowledge of what the social records contain he cannot be expected to demonstrate the relevance of particular items in his request." *Watkins* v. *United States,* 343 F. 2d 278, 282 (D.C. Cir. 1964).

Clearly then without the benefit of such records counsel could not know what to supply, explain, or refute. This was unambiguously stated by petitioner's counsel at that

time. Without the social service file he declared he was unable "to study the data upon which a judicial decision as to waiver [would] be based" and consequently "[petitioner would] be denied effective assistance of counsel." See *Statement of the Case, supra.*

Reliance on the social records by the Juvenile Court in this case thus constituted the equivalent of the consideration of secret evidence of petitioner's unsuitability for treatment under Juvenile Court auspices. It bears repeating in this connection that this secret evidence included evidence of crime.[18] Use of this secret evidence—embodied in a dossier—prepared by a non-legal staff—is patently incapacitating to a child facing waiver. Whether or not afforded assistance of counsel at that stage—such a victim of secret inquisitorial procedures, would not know what to supply, explain, or refute.

Moreover, the Juvenile Court judge who depends on the dead letter of a dossier, i.e., the social record, reflective of evidence received "at second hand and in a distilled form at that" [19] is himself handicapped in decision-making.

Maximal procedural flexibility under administrative law still entitles "[a] party appearing before an agency . . . [to] insist that the agency advise him, by specific reference, of those parts of its general files and records on which it intends to rely in reaching a decision in the particular

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[18] Policy Memorandum in effect at the time of petitioner's case in Juvenile Court—it will be recalled—explicitly identified "prosecutive merit of the complaint" as a criterion of waiver. See Statement of the Case, *supra.*

[19] The language quoted refers to the secular inquisitorial procedure of the *Ancien Régime.* See Ploscow, *The Development of Present-Day Criminal Procedures in Europe and America,* 48 Harv. L. Rev. 433, 452 (1935).

adversary proceeding with which he is concerned. . . . [Moreover] to the extent that the agency's findings must be supported by the record of the proceedings before it, the agency is bound to introduce into the record at least enough of its information to afford substantial support for its findings." COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS, 170-1 (1951).

(2) *No Hearing.*

Petitioner demanded but did not secure a hearing at which he could have presented his case against waiver, i.e., at which he could have adduced evidence to show that he was properly susceptible to rehabilitation under Juvenile Court auspices. Needless to say, a hearing could have been held meaningfully only upon the disclosure of the social records and on the further resolution of the question of petitioner's mental competency to participate therein, raised by the first medical affidavit, filed in Juvenile Court.[20] Neither condition had been satisfied in this case.

With all deference to a distinguished Chief Judge's view, we submit that the most plausible inference to be drawn from the record is that the Juvenile Court had acquired but

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[20] Bazelon, *C.J.*, with whom Wright, *J.*, concurred, dissented from a *per curiam* order granting petitioner's motion for leave to withdraw a petition for rehearing *en banc* in the Court of Appeals, declared:

> "As Judge Washington's concurring opinion recognizes, 'It is a fair inference from the record before us that one of the reasons why the Juvenile Court waived jurisdiction was because appellant was seriously disturbed and the Juvenile Court lacked facilities adequately to treat him.' I think it shocking that a child was subjected to prosecution and punishment as a criminal because he was thought to suffer from a serious mental or emotional disturbance." *Kent* v. *United States*, 343 F. 2d 247, 264 (D.C. Cir. 1965).

a superficial impression of petitioner's deteriorating mental state. Petitioner's doctors had but ventured tentative opinions and petitioner had not been examined by a psychiatrist at the behest of Juvenile Court at any time.

Petitioner in sum was denied rights viewed as essential to due process in actions affecting the disposition of property. See, e.g., *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950); *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292 (1937); see also *Cooper, supra*, 149-249.

It appears insufficient to suggest, as did McGowan, *J.*, for the majority in this case in his Court, that Juvenile Court action denying a hearing could be justified on the theory that the Juvenile Court "administers a non-criminal process in the nature of social service work directed to the accommodation of the interests of the juvenile and of society." [21]

Rational or fair judgment—whatever the level of decision-making—depends on far more than good intentions. The most conscientious judge cannot act in an enlightened and hence fair fashion unless he has *all* relevant factual information brought to his focus of attention, where it is subject to competent and full assessment.

The "right to be heard"—in the context of Juvenile Court proceedings involving sanctioning such as probation

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[21] *Kent* v. *United States*, 343 F. 2d 247, 258 (D.C. Cir. 1965). In the instant case, the Court of Appeals further relied on its earlier decision of *Wilhite* v. *United States*, 281 F. 2d 642 (D.C. Cir. 1960) which denied the existence of a right of a hearing in advance of waiver. The case seems distinguishable from the one at the bar.

or institutionalization under Juvenile Court auspices has in fact been widely recognized.[22]

The District of Columbia has been conspicuous among supporters of that right in that context.[23]

A major beginning moreover has been made to effect national recognition of the "right to be heard" in waiver proceedings.[24] The significance of such a right to due process is underscored by the facts of this case.

(3) *Loss of Effective Assistance of Counsel.*

In the maelstrom of waiver proceedings in the instant case the protective role of counsel—a counsel denied essential information—was in fact illusory.

Outside the waiver context, the "right to be heard" in Juvenile Court proceedings has been held to comprehend

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[22] The trend, as previously noted, has been toward the adoption of a standard of fundamental fairness for Juvenile Court proceedings involving institutionalization or probation under Juvenile Court auspices. See cases cited in *Application of Naylor, supra,* at 207 A. 2d at 10. See also *In Re Mantell,* 158 Neb. 900, 62 N.W. 2d 208 (1954).

At least one state court has viewed a hearing necessary for a valid transfer of jurisdiction from Juvenile to Adult Court, under state law authorizing such transfer, though that law was silent on the necessity of a hearing. See *Childers* v. *Commonwealth,* 239 S.W. 2d 255 (Ky., 1951).

National Council of Juvenile Court Judges, Comparative Study of Juvenile Court Systems (1964), provides further detail on various state statutes on this score. Section 13 of the *Standard Family Court Act* prepared by the Committee on the Standard Family Court Act of the National Probation and Parole Association in cooperation with the National Council of Juvenile Court Judges and the U.S. Children's Bureau in 1959 requires a full investigation and *hearing* prior to waiver.

[23] *Shioutakon* v. *District of Columbia,* 236 F. 2d 666 (D.C. Cir. 1956).

[24] See materials in footnote 22, *supra.*

"effective assistance of counsel", as a matter of fundamental fairness.[25]

Within the context of waiver proceeding themselves, "the right to effective assistance of counsel" is yet to be successfully claimed in this Circuit on any grounds.[26]

The acceptance of such a claim is overdue under the Sixth Amendment as made obligatory on state and local jurisdictions under the due process clause. See *Escobedo* v. *Illinois,* 378 U.S. 478 (1965); *Gideon* v. *Wainwright,* 372 U.S. 335 (1963).

III.

Statutory Safeguards Against Improvident Juvenile Court Action Through Waiver or Otherwise Were Denied to the Petitioner.

A. *Petitioner was denied the right of "full investigation" in advance of waiver.*

Congress has vested in the Juvenile Court of the District of Columbia "exclusive jurisdiction" over children charged with offenses which would constitute felonies or misdemeanors if committed by adults. D.C. Code § 11-907 (1951).[26a]

A child between 16 and 18 charged with an offense constituting a felony, or a child of any age charged with an

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[25] *Shioutakon* v. *District of Columbia, supra.*

[26] The Juvenile Court of the District of Columbia has not heretofore appointed counsel for indigent juveniles, facing waiver of jurisdiction. *Cf.* the requirement of this Court for the adult facing criminal charges in *Gideon* v. *Wainwright,* 372 U.S. 335 (1963).

[26a] The revised section—D.C. Code § 11-1551 (1963) provides no substantive change.

offense punishable by death or life imprisonment may, however, be tried as an adult accused of a crime, *but only* if after *"full investigation"* the Juvenile Court waives jurisdiction. D.C. Code, § 11-914 (1951). That section provides in full:

> "If a child sixteen years of age or older is charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment, the judge may, after full investigation, waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult; or such other court may exercise the powers conferred upon the juvenile court in this Act in conducting and disposing of such case."

The necessity for an investigation which is truly "full" is emphasized by the disparity in the potential consequences to the child if he remains within the rehabilitative protection of the Juvenile Court or if he is relegated to adult criminal law. In this case, having been charged with rape, housebreaking and robbery, waiver of jurisdiction over petitioner exposed him to the risk of punishment of "death by electrocution" and in fact resulted in the imposition of a ninety year term of imprisonment.

The statute requires a "full investigation". That obviously means an inquiry not only into the facts of the alleged offense but also into the question whether the *parens patriae* plan of procedure is desirable and proper in the particular case. *Pee* v. *United States,* 274 F. 2d 556, 559 (D.C. Cir. 1959); *Shioutakon* v. *District of Columbia, supra.* See also,

D.C. Code, § 11-902 (1951). Exercise of the power of waiver must fit this purpose. It "permits the Juvenile Court to determine *which children will be amenable to the treatment resources at its disposal* and to transfer its jurisdiction in cases demanding such action." H. Rep. No. 242, 80th Cong., 1st Sess., 2 (1947) (emphasis supplied). An investigation to be "full" must therefore embrace all factors relevant to a determination by the Juvenile Court whether or not the child "will be amenable to the treatment resources at its disposal. . . ."

The Court of Appeals in turn has held explicitly that "the waiver of Juvenile Court jurisdiction, upon which District Court jurisdiction attaches, *depends* upon a 'full investigation' by the Juvenile Court". *Green* v. *United States,* 308 F. 2d 303 (D.C. Cir. 1962). It has said that "what is required before a waiver is . . . 'full investigation' ". *Id.,* 305. And full investigation, it has stated "prevents the waiver of jurisdiction as a matter of routine for the purpose of easing the docket. It prevents routine waiver in certain classes of alleged crimes. It requires a judgment in each case based on 'an inquiry not only into the facts of the alleged offense but also into the question whether the *parens patriae* plan of procedure is desirable and proper in the particular case.' " *Ibid.*

It would seem strangely inconsistent with the basic philosophy of the Juvenile Court law if an investigation conducted by Juvenile Court were not to comprehend a psychiatric examination at least upon the presentation of some *prima facie* evidence of mental unsoundness. A number of state Juvenile Court statutes have in fact explicitly required a mental examination preliminary to waiver of jurisdiction. (See, *e.g.,* Sec. 2151.26, *Page's Ohio Rev. Code Ann.,* providing that the full investigation in advance of

waiver of jurisdiction by a Juvenile Court shall include "a mental and physical examination of such child . . . by the Bureau of Juvenile Research, or by some other public or private agency, or by a person qualified to make such examination. . . .") This specificity simply makes explicit what is clearly implicit in any Juvenile Court statute. Congress does not have less solicitude for the child and less enlightenment as to the need for an inquiry into mental health than does the Ohio Legislature.

An apt expression of Juvenile Court philosophy throughout the nation has been provided in these words:

> "The Children's Court, if it is to perform the high purposes for which it was created, to wit, the rehabilitation of children brought before it, and the salvation of child life, must take into consideration, not only the bare and apparent facts, but must go behind the facts and inquire as to the causative factors productive of those facts." *In re XYZ,* 24 N.Y.S. 2d 456.

The actual practice in the District of Columbia in the case of an adult charged with an offense makes the uncontradicted allegation of the existence of a mental disorder, even when made by laymen, sufficient to warrant the granting of a mental examination in an adult proceeding. The duty of the Court under those circumstances is "to grant the motion and order appropriate 'mental examination.'. . ." See e.g., *Lloyd* v. *United States,* 247 F. 2d 522 (D.C. Cir. 1957).

Yet in this case the Juvenile Court spurned information on the vital subject of petitioner's mental health and at no time proceeded to make its own independent determination as to the nature of the mental illness which it itself admitted was probable. An uncontroverted affidavit of a

psychiatric expert submitted by petitioner, had informed the Juvenile Court that petitioner was a victim of severe psychopathology and that a complete investigation of the psychological and social factors of his case was impossible without placing him in a hospital situation for psychiatric observation. Such an examination was feasible. The Juvenile Court was informed, and this Court may judicially notice, that "adequate psychiatric facilities in the handling of . . . [petitioner were] available to the Juvenile Court in the D.C. General Hospital, which has an in-patient department specializing in the care of children and adolescents". See *motion to dismiss indictment and accompanying affidavits.* Thus the Juvenile Court was apprised of the need for and the availability of a careful inquiry into petitioner's mental health. Without it the Court could not have received responsible and reliable information as to either the petitioner's then existing state of mental health or *as to the prospect of his rehabilitation with proper care.* Yet no such inquiry was conducted.

To this day, in fact, there has been no inquiry as to the prospects of petitioner's rehabilitation with proper care, a subject crucial to a rational determination as to waiver.

B. *Petitioner was denied the right of inspection of relevant social records in the possession of the Juvenile Court.*

Juvenile Court was duty bound to make the social records available to counsel. D.C. Code § 11-929(b) (Supp. VIII, 1960) explicitly directs that:

> "The records made by officers of the court pursuant to sections 11-908 and 11-924, referred to in this section as social records, shall be withheld from indiscriminate public inspection, except that such records or parts

> thereof shall be made available by rule of court or special order of court to such persons, governmental and private agencies, and institutions as have a legitimate interest in the protection, welfare, treatment, and rehabilitation of the child and to any court before which any such child may appear. The judge may also provide by rule or special order that any such person or agency may make or receive copies of such records or parts thereof. No person, agency, or institution which has received records or information under this section may publish or use them for any purpose other than that for which they were received." [27]

To furnish the records to counsel is of course not to exhibit them to "indiscriminate public inspection." On the contrary, it is to supply them precisely to the person to whom the statute mandates disclosure. For the records *"shall be made available* by rule of court or special order *to such persons . . . as have a legitimate interest in the protection, welfare, treatment, and rehabilitation of the child. . . ."* (Emphasis supplied.) The child's counsel is just such a person.[28]

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[27] *Cf.* disposition of *Watkins* v. *United States, supra.* We note again that the revised D.C. Code § 11-1586(b) produced no substantive change.

[28] The requirement of disclosure was added by an amendment enacted in June 12, 1952, 66 Stat. 134, for the very purpose of removing the seal of secrecy when the records were sought by those having a legitimate interest in them. H. Rep. No. 1937, 82d Cong., 2d Sess. (1952); S. Rep. No. 1195, 82d Cong., 2d Sess. (1952); 98 Cong. Rec. 1305. There can of course be no doubt as to the legitimate interest of the child's counsel.

Compare S. Rep. No. 530, 75th Cong., 1st Sess., 4 (1937); "Privacy of hearings is provided, but the definition of privacy does not exclude any person having a legitimate interest in the case, including legal counsel. The public in general, and morbid curiosity seekers in particular, alone are excluded."

C. Petitioner was denied immunity from fingerprinting, detention and interrogation at police headquarters.

Congress has explicitly recognized that "no public record may be made of a child's contact with Juvenile Court. D.C. Code § 11-929(c) declares beyond any possibility of misunderstanding:

> "It shall be unlawful for any person or persons to disclose, receive, or make use of, or authorize, knowingly permit, participate in, or acquiesce in the use of any information concerning any juvenile before the court, *directly or indirectly* derived from the records, papers, files or communications of the court, *or* acquired in the course of the performance of official duties." [28a] (Emphasis supplied.)

Since the petitioner's arrest by the police could be founded only on "the performance of official duties" concerning a juvenile subject to the jurisdiction of the Juvenile Court, the transmission of his fingerprints to the prosecution flouted the Congressional enactment.

A juvenile, subject to the exclusive jurisdiction of the Juvenile Court, is assured of anonymity as a general condition of the constitutionality of all phases of the Juvenile Court proceedings. See *e.g., Pee* v. *United States,* 274 F. 2d 558 (D.C. Cir. 1959). The fingerprinting of a juvenile under the aegis of the Juvenile Court destroys the anonymity secured to him under law without compensating him for such loss or for that of the traditional constitutional safeguards available under the adult law.

[28a] Again—the revised section, D.C. Code § 11-1586(c) (1963) produced no substantive change.

Congress has further prescribed the procedure to be followed after taking a child into custody—again flouted in petitioner's case. D.C. Code Ann. § 11-912 (1960) governing the arrest of a juvenile provides as follows:

> "Whenever any officer takes a child into custody, he shall, unless it is impracticable or has been otherwise ordered by the court, accept the written promise of the parent, guardian, or custodian to bring the child to court at the time fixed. Thereupon such child may be released in the custody of a parent, guardian or custodian. If not so released, such child shall be placed in the custody of a probation officer or other person designated by the court, or taken immediately to the court or to a place of detention provided by the Board of Public Welfare, and the officer taking him shall immediately notify the court and shall file a petition when directed to do so by the court."

It seems clear that Congress sought to avoid, not encourage the police activities directed at the petitioner in this case.

[28b] Revised D.C. Code § 16-2306 (1963) provides no substantive change.

IV.

The District Court—Clearly Without Jurisdiction Over the Petitioner in the Light of I. to III. Above as an Adult Court Did Not Even Hold a Token Hearing as to the Uncontroverted Allegations of Improper Waiver—or as to the Desirability or Necessity of Constituting Itself a Juvenile Court Under the Authority of the D.C. Code—But Compounded Existing Prejudice by Its Own Brand of Unfairness Against the Petitioner.

The District Court denied petitioner a hearing as to the allegations constitutive of improper waiver by the Juvenile Court notwithstanding appropriate offers of proof. *Transcript of Proceedings Before Chief Judge McGuire,* Feb. 8, 1963, pp. 16 and 21.

It denied petitioner's motion to constitute itself a Juvenile Court—a matter within its statutory power—again without hearing and even without legal argument and declared that it was doing so "with emphasis". *Transcript of Proceedings Before Chief Judge McGuire,* Feb. 5, 1963, p. 16 and Feb. 8, 1963, p. 21. See also D.C. Code § 11-914 (1951). Cf. D.C. Code § 11-1553 (1963).

It declared that a "stimulated activity", attributed to the National Institute of Health and the Washington School of Psychiatry consisting of providing psychiatrists to an otherwise indigent petitioner would "get [someone] in serious trouble". *Proceedings Before Chief Judge McGuire,* Feb. 18, 1963, p. 26.

It suffered denigration of defense psychiatrists in open court. *Id.,* 27-28 (T. 743-45, 764-66). It suffered denial by the Jail authorities of a defense psychiatrist's request

to examine his patient. *Affidavit of Dr. Warren C. Johnson in District Court.*

It ordered petitioner's trial counsel—almost on the eve of trial—to "advise" the Court about the activities of the suspect Washington School of Psychiatry—by the end of the week for no reason apparent within the record other than that institution had helped furnish petitioner with psychiatrists at no cost to himself. *Proceedings Before Chief Judge McGuire,* Feb. 18, 1963, pp. 28-29.

It destroyed in sum any atmosphere susceptible of tolerance of the unorthodox in the petitioner's defense and as a consequence denied him due process.

V.

The District Court Committed Reversible Plain Error, Affecting Substantial Rights, by Admitting into Evidence and Permitting Reference to Fingerprints Taken From Petitioner by the Police While Petitioner Was Under the Exclusive Jurisdiction of the Juvenile Court.

The fingerprinting of the petitioner by the police took place on two occasions while petitioner was a ward of the Juvenile Court—once two years before—the second time immediately after the arrest in the instant case. On each occasion petitioner—held without legal representation—was under the "exclusive jurisdiction of the Juvenile Court."

It is difficult to conceive of the creation of any more definite and damaging a record—from the standpoint of the future welfare of the child—than the fingerprinting of such child and the inclusion of such fingerprints within the criminal files of the Police Department.

It follows that upon this score alone the use of fingerprints in the adult proceedings in District Court constituted reversible plain error as practice subversive of the protective scheme of the Juvenile Court law.

Even if the fingerprinting in the instant case be viewed as not explicitly barred under law, the disclosure of such fingerprints in District Court or elsewhere is barred under the express mandate of the Juvenile Court law. It must be recalled that these fingerprints were taken while petitioner was under the exclusive jurisdiction of the Juvenile Court—either as information which was part and parcel of the juvenile's files or otherwise "in the course of the performance of official duties." On this point the statute is explicit. The disclosure of fingerprints as part of any information concerning the juvenile which is "directly or indirectly derived" from the "records, papers, files, or communications of the [Juvenile] court *or* [which is] *acquired in the course of the performance of official duties,*" is expressly prohibited under the Juvenile Court law. D.C. Code § 11-929(c). (Emphasis supplied.) Such disclosure, moreover, is punishable by fine and/or imprisonment. *Ibid.*[28c]

The Juvenile Court has never engaged in the fingerprinting of juveniles under its jurisdiction. Were it to have done so—it would have violated the inherent purpose of the Juvenile Court law. Had it acquired such fingerprints by any manner or means or from any source it would be explicitly barred by statute from transmitting or disclosing them on any level. D.C. Code § 11-929(c). Congress has not intended to provide the police with authority it has explicitly denied the Juvenile Court. It is self-evident

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[28c] Revised D.C. Code § 11-1586(c) is substantially identical.

that insofar as the action of the police in the instant case has any color of authority it was derived from the authority of the Juvenile Court law. Under that law the use of such fingerprints in District Court under the facts of this case was plainly illegal.

Both instances of fingerprinting of petitioner, moreover, are also subject to a further taint of illegality. The fingerprints were obtained in the course of the detention of petitioner by police—without authority of the Juvenile Court—in the face of the statutory command that such juvenile upon arrest be placed within the custody of designated persons, not including the police. D.C. Code Ann. § 11-912 (1960).

Without the benefit of any statutory prohibition, the Court of Appeals for the D.C. Circuit held fingerprints obtained in the course of an illegal arrest and detention subject to exclusion in the District Court. As expressed by the United States Court of Appeals for the District of Columbia Circuit:

> "True, fingerprints can be distinguished from statements given during detention. They can also be distinguished from articles taken from a prisoner's possession. Both similarities and differences of each type of evidence to and from the others are apparent. But all three have the decisive common characteristic of being something of evidentiary value which the public authorities have caused an arresting person to yield to them during illegal detention. If one such product of illegal detention is proscribed, by the same token all should be proscribed." *Bynum* v. *United States,* 262 F. 2d 465 (D.C. Cir. 1958).

The extensive character of the violation of both constitutional and statutory rights of the juvenile through his fingerprinting and the subsequent use of his fingerprints to secure his conviction in the District Court requires reversal as plain error affecting substantial rights. Rule 52(b) F.R.Cr.P., Cf. *Mapp* v. *Ohio,* 367 U.S. 743 (1961).

We again invite the attention of the Court to the fact that a revision of the Juvenile Court Act, not in effect at the time of the petitioner's proceedings in Juvenile Court, was enacted by Congress and became law December 23, 1963. Pub. L. 88-241. This revision has not made any substantial changes affecting the rights of juveniles.

VI.

The District Court Erred in Failing to Grant Petitioner's Motion for Judgment of Acquittal on All Counts, Especially on the Ground of Insanity.

Against all the psychiatric, psychological and lay evidence offered by the defense, the prosecution offered the testimony of but two expert witnesses in rebuttal. To sustain its burden, the prosecution called Dr. David J. Owens and Dr. John R. Kavanagh. On the first issue Dr. Owens testified that the defendant was suffering from a mental disease on the date of the alleged commission of the acts charged against him, i.e., "schizophrenic reaction, chronic undifferentiated type" (T. 672). On this issue Dr. Kavanagh testified substantially as follows: "I decided that he did not have a mental disease" (T. 690).

However, this witness also testified that the defendant was suffering from a "form of sexual perversion and transvestism" (T. 700); that the defendant had a nervous mani-

festation "sometimes referred to as an irritable or spastic colon" (T. 701); that the defendant had schizoid tendencies (T. 702); that "I hope I haven't given the impression" that the defendant is a normal individual (T. 704); that the defendant has a schizoid personality (T. 705); that in his opinion a personality disorder in which the schizoid personality would be included does not represent a disease in either the terminology used by the Court or the terminology used by psychiatrists (T. 706); that the defendant's withdrawal during the examination of him "was one of the manifestations of the symptoms of schizophrenia" (T. 708); that some of the things done by defendant constitute a form of sexual perversion and "it would come in the classification of sociopathic personality disturbances in which sexual perversion is a sub-variety. So it is my opinion it would be evidence of a personality disorder rather than a disease" (T. 710); that he was familiar with the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association and personality disorder was a valid classification of mental diseases and disorders when listed in said Manual (T. 710); (Such personality disorders are in fact listed as mental disorders within that Manual.) that other conduct exhibited by defendant is also evidence of a personality disorder (T. 711); that "It is my feeling that in my examination I did not find anything more than a schizoid personality and granted perhaps a schizoid personality may go ahead and become schizophrenic, I found no evidence of schizophrenia" (T. 718); that he would classify the schizoid personality as a personality disorder (T. 719); that it is so classified in the Statistical Manual (T. 705); that the psychological tests given petitioner by Dr. Bernard Levy (who testified for defense) indicated that the defen-

dant was suffering from schizophrenia, undifferentiated type (T. 725).

It thus follows, that the prosecution failed to establish beyond a reasonable doubt that the petitioner had no mental disease or defect at the times of the alleged commission of the offenses charged. As interpreted by the Court of Appeals, the concept of disorder included any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls. See *McDonald* v. *United States,* 312 F. 2d 347 (D.C. Cir., 1962).

To sustain its burden of proof beyond a reasonable doubt on the issue that although the accused was defective or diseased, his alleged acts were not the product of his affliction, the prosecution produced the testimony of only one witness, Dr. Owens, *supra,* to rebut the testimony of the defense.

In answer to hypothetical questions not based upon admitted facts or upon facts disclosed in the record asked by the prosecutor, this witness gave conflicting testimony with reference to productivity with relation to the robbery counts. The questions were based on the assumption that the petitioner allegedly first committed robbery in each of the premises prior to committing the alleged assaults. These do not appear to be the facts as disclosed in the record, and therefore such testimony would seem of no value and inadmissible.

The witness was asked the improper hypothetical questions four times (robbery first) and his answer the first time regarding the alleged Echols robbery was that "assuming the information that you gave me, I would say that schizophrenia was not—did not cause the robbery

itself" and "I would have no opinion about the housebreaking" (T. 674); in answer to the improper question regarding the alleged Palmer robbery, the witness answered "Probably not"; in answer to the improper question regarding the alleged Murphy robbery, the witness answered "The robbery was probably not, assuming the information that you gave me" (T. 676). In answer to the same improper questions asked the second time by the prosecutor of this witness regarding all three alleged robberies, the witness testified "If the primary motivation were robbery or to get something to eat, then this would not be connected with the sexual pre-occupation which was in turn a symptom of his illness. This is the reason I have difficulty in arriving at a firm opinion as to the productivity" (T. 678). The witness answered the hypothetical improper question regarding the three alleged robberies asked by the prosecutor for the third time by testifying "I would say his primary motivation was robbery. Because this is the first thing that he did. It is very simple and I can answer this is what he did first. This is assuming that this is correct, his motivation was accomplished by his first act when he entered" (T. 680). On cross examination, the witness testified on the productivity regarding the robbery counts *"I think my opinion is still that I don't have a firm opinion one way or the other"* (T. 683). On redirect the prosecutor was permitted by the Court to ask the improper hypothetical question regarding the robberies of this witness for the fourth time, and he testified "I would say that from the information that you have just given, if this is correct, then I cannot see a connection between a robbery and his illness" (T. 688).

It should be noted that the prosecutor aggravated this situation by twice stating to the jury in his arguments that the three robberies occurred prior to the assaults.

As an expert witness, the witness is permitted to testify to his inference from facts. His opinions are what is sought. And these opinions must be based upon facts he has himself observed, or facts he has heard others relate, or on hypothetical facts presented to him. His purpose is to give educated conclusions based upon fact. *Blunt* v. *United States,* 244 F. 2d 355 (D.C. Cir. 1957).

It seems obvious that the opinions given by this witness regarding productivity on the robbery counts was of no value and inadmissible because they do not appear to be based upon admitted facts or upon facts within his knowledge disclosed in the record. These opinions were not admissible in evidence for the same reason.

Surely even if these opinions on the robbery counts were to be assumed to have been based on facts disclosed in the record, it is clear that they cannot sustain the government's burden of proof as to petitioner's mental state.

It is further obvious that this witness did not rebut or attempt to rebut the productivity regarding the housebreaking counts in any substantial manner.

The judgment in this case must therefore be set aside. It seems clear beyond question that at the close of all the competent evidence a reasonable mind must necessarily have had a reasonable doubt as to the sanity of accused at the times the alleged acts were committed, and that if said acts were committed by him, they were the product of his mental disease. The trial judge should therefore at the conclusion of the case have directed a judgment of acquittal by reason of insanity. *Isaac* v. *United States,* 284 F. 2d 209 (D.C. Cir., 1960); *Curley* v. *United States,* 160 F. 2d 209 (D.C. Cir., 1947).

VII.

The District Court Further Committed Reversible Plain Error Affecting the Substantial Rights of Petitioner When It Gave the Jury the So-called "Allen" or "Dynamite" Charge Before the Jury Retired to Consider Its Verdict.

It must be remembered that a principal defense to all the counts in the indictment was insanity, and it appears from the verdict of not guilty by reasons of insanity on two counts and guilty on the other six counts, that the jury rendered a compromise verdict.

It must further be remembered that in *Allen* the charge was given to the jury after the main charge was delivered, and when the jury had returned to the Court apparently for further instruction. No brief was filed on behalf of Allen in the Supreme Court. *Allen* v. *United States,* 164 U.S. 492 (1896).

The charge given here went beyond the "Allen" charge. Here, the trial court gave the jury before it retired to consider its verdict the substance of the "Allen" charge plus the Supreme Court's comments on this instruction, and further added "It is your duty to decide this case if you can conscientiously do so".

The trial court here was not authorized to tell the jury, at any stage of the trial, that they must agree or agree by compromise. This peremptory order to arrive at a verdict is logically inferred from the charge, and is plain coercion and an invitation by the Court of the province of the jury. The charge also expressly or impliedly suggested that the jury compromise in order to arrive at an agreement.

All of this resulted in an improper direction or coercion by the trial court, and for this reason alone the verdict must be vacated on this appeal.

As stated in *Green* v. *United States,* 309 F. 2d 852 (Fifth Cir. 1962):

> "The Allen or 'dynamite' charge is designed to blast loose a deadlocked jury. . . . This is the outermost limits of its permissible use. The jury system rests in good part on the assumption that the jurors should deliberate patiently and long, if necessary, and arrive at a verdict—if, but only if, they can do so conscientiously. It is improper for the Court to interfere with the jury by pressuring a minority of the jurors to sacrifice their conscientious scruples for the sake of reaching agreement."

In *Powell* v. *United States,* 297 F. 2d 318 (Fifth Cir. 1952) the Court said:

> "It is implicit in the decisions of the Supreme Court dealing with the Allen case, e.g., Burton v. United States, 196 U.S. 283, 25 S.Ct. 243, 49 L.Ed. 482, and Brasfield v. United States, 1926, 272 U.S. 448, 47 S.Ct. 135 (71 L.Ed. 345), that the Fourth Circuit was correct in its recent holding (In United States v. Rogers, 1961, 289 F. 2d 433, 435-37) 'that the Allen charge, itself, approaches ultimate permissible limits * * *' in handling situations similar to that facing the court below."

In *Shaffman* v. *United States,* 289 F. 370, 375 (Third Cir. 1923) the Court said:

> "If the charge as a whole, upon a fair and reasonable interpretation, had, or was calculated to have, the

effect of coercing the jury into rendering a compromise verdict, the judgment must be reversed."

In the case here, the dynamite exploded before there was any reason to think that blasting was necessary. Even if the trial judge had given the charge after the jury had retired, the charge would have exceeded the permissible limits to which the Court might go in its endeavor to influence the jury towards the rendition of a verdict. The vice in the charge here was the Court's interference with the jury function. No matter when the charge was given, it gave the jury false notions of the validity and force of majority opinion; and it prejudiced the right of the petitioner to a hung jury and a mistrial by tending to stifle the dissenting voices of minority jurors.

Conclusion

By virtue of the foregoing the judgment of the Court of Appeals should be reversed and the case remanded for the trial of petitioner as a juvenile under D.C. law, or in the alternative, with directions to enter a judgment of acquittal by reason of insanity.

Respectfully submitted,

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APPENDIX A

The following is a chronological summary of District Court proceedings upon trial of this case:

The prosecution called a number of witnesses in its attempt to establish the guilt of defendant on the indictment. The first witness called by the prosecution was Juanita A. Echols (T. 28) who testified that in the early morning hours of June 5, 1961 she lived alone in apartment 508, 5th floor of 2153 California Street, N.W., Washington, D.C.; that there was a fire escape leading to the kitchen window of said apartment; that she was awakened at approximately 1:00 in the morning by a figure who leaped on her couch and grabbed her; that she started screaming, told the person her billfold was on the dresser, and he dragged her over to where the billfold was and which contained $12.00; that he put the wallet in his pocket, dragged her back to the couch and had sexual intercourse with her. The prosecutor then informed the court as follows (T. 36):

> "May I inform the Court and counsel of something in regard to this witness here. At a subsequent point of time a man named, I think, Lanham, was picked up and put in the lineup and viewed by this defendant, by this complaining witness, and she was unable to identify Lanham. At a subsequent point of time a man whose name I think was Thurston, both of these were Negro males, was put in a lineup and she identified Thurston as the person who had been in her apartment. Thurston was not in fact the person who was in there."

That she was not able to identify the person who was in her apartment (T. 47-48), that she later identified a man at a police lineup as the intruder who was not the defendant. The witness never testified she failed to give consent to the alleged conduct of the intruder.

The prosecutor next called as witnesses Dr. Helms, then Officer Allen, then Officer Carlson, then Officer Kline, then

FBI laboratory agent Cornelius G. McKnight, all of whom gave testimony tending to show there was an act of intercourse had by the complaining witness with a male on June 5, 1961.

The prosecutor then called as a witness Officer John Becker, Identification Bureau of Metropolitan Police Department (T. 76) who testified that on June 5, 1961, after midnight he developed four latent fingerprints which were on the window ledge of apartment 508; that one of the four was identical with the rolled print of No. 9 finger of petitioner (taken from petitioner after his arrest); that there were some latent fingerprints of others on the same window ledge which the witness never attempted to identify (T. 91-92).

The prosecution then called Gloria Jean Palmer as a witness (T. 96) who testified that in the early morning hours of June 12, 1961 she shared apartment No. 303, 1311-30th Street, Northwest with one Constance Walsh who did not testify; that about 1:30 in the morning she was awakened by a hand over her mouth; that she screamed and the individual went out the door; that she was not able to identify the alleged intruder; that after the police visited her apartment, they asked her to check and see if anything was missing (T. 103); that she then discovered her wallet with $47.00 in it was missing; that she thereafter saw smudge prints on the wall; that she cannot identify the petitioner as the intruder (T. 107); the Court denied defense counsel's motion to strike the testimony of this witness (T. 108).

The prosecution then called Officer William R. Holden as a witness, (T. 108) and he testified he saw several smudges on the wall of said apartment when he inspected same.

The prosecution then called Officer James Jones, of the Identification Bureau as a witness (T. 111) who testified he examined smudge marks in the hallway of the premises; that he developed a latent fingerprint which was on the closet door located in the hallway of the apartment; that he compared this print with the rolled print taken from

petitioner as heretofore described, and they were similar.

The prosecution then called Mary L. Murphy as a witness (T. 131) and she testified that in the early morning hours of September 2, 1961 she lived alone in apartment 307, 1717 20th Street, N.W.; that the living room window led out to the fire escape; that her wallet containing $12.00 was about seven feet from her bed, near the kitchen; that she was awakened by someone's hand on her neck; that such person said, "If you are not quiet, I will kill you;" that "I lay quiet and he raped me;" that she then called the Metropolitan Police Department; that after detectives arrived, she did not look around the apartment (T. 142); that after the officers came from No. 3 Precinct, "I found my wallet was gone with the $12.00;" (T. 144) that the petitioner was the person who raped her (T. 148).

The prosecution then called officer Robert M. Boyd, third precinct, as a witness, and he testified he responded to the premises at approximately 4:45 A.M. on September 2, 1961, and he described the appearance of Miss Murphy (T. 152-161).

The prosecution then called police woman Ernestine Johnson as a witness (T. 162) and she identified Murphy's night gown.

The prosecution then called detective Wolfgang as a witness (T. 164) and he testified he visited Murphy's apartment after 5:00 A.M. September 2, 1961, and identified photographs of the interior of the apartment and certain articles taken by him from there, and that he took some of the items with another officer to the FBI laboratory; that he saw and talked to Murphy on this visit; that he and other officers placed defendant under arrest about 3:00 P.M. September 5, 1961 (T. 178) at home of defendant 1823 S Street, N.W., that Murphy first gave description of her assailant as a Negro between the ages of 25 and 30 (T. 180).

The prosecution then called FBI agent Allison C. Semmes as a witness (T. 182) and he testified regarding the articles turned over to him from the Murphy apartment.

The prosecution then called Officer Robert H. De Milt as a witness (T. 189) and he testified he visited the Murphy premises at 8:00 A.M., took a table from the fire escape to the identification bureau at police headquarters (T. 194) after a latent fingerprint appeared on the top step of the table.

The prosecution then called police Sergeant Hayden of the Detective Identification section as a witness (T. 196) and he testified he rolled the prints of defendant on Sept. 5, 1961 after defendant was arrested in this case; that he lifted a latent fingerprint from the table taken from the Murphy apartment and it compared with the rolled print he took of defendant (T. 206) that he could not state how long the latent fingerprint had been on the table.

The prosecutor then volunteered to the Court that Echols identified another person, not the defendant, from a photograph as the intruder, but could not identify that person when seen in a lineup (T. 213). The prosecution then rested its case (T. 215).

Counsel for defendant then moved for judgments of acquittal on all counts of the indictment (T. 215) and said motions were overruled.

The defendant then called as a witness Mrs. Courtney T. Kent, the defendant's mother and she testified that when the defendant was 2 years old he witnessed his father attempting to choke her to death (T. 218); that immediately thereafter he became very nervous and would run and hide from his father; that his behavior changed and "he would be in a trance" (T. 220) that at times his teacher "couldn't get him to hear her. He repeated his grades" (T. 220); that "he couldn't control his bowels up until they picked him up at the age of sixteen"; that when he was sixteen "someone gave him a lovely puppy and he carried it off and killed it. But he grieved so after it"; that he would cover the windows in his room "because he said voices would tell him to do things and he couldn't help himself. They would tell him to go down and look at the television and after he went down there, he said they told him to go out in the

street, and he couldn't help himself." (T. 221); that her son would talk when no other persons were around "and I would ask him what he was saying; and he said, "Don't bother me; and so many different times I tried to talk to him and he didn't hear me. He couldn't hear the doorbell ring at times. At times, he was in a deep study" (T. 221); that when the defendant was in the Receiving Home at the age of 14 charged with committing an offense, he told her "he didn't understand it and he hoped God would take care of him because it was going to happen again soon and he just didn't understand it" and "Please, Mama, get a psychiatrist for me because I don't understand." (T. 222-223); that he would have nightmares and "he would rise up in bed reaching for something all the time when I would awaken him. He would act as if he was reaching from something. And he said something was always after him and talking to him" (T. 225); that she questioned him about these voices "and he said, Mama, they talk to me when I am walking along the street, and they tell me to run in a lady's house or on a porch and then the police want to pick me up when they catch me running" (T. 225); that he was disturbed all the time; that "he would sit down and didn't say anything to anyone and he just seemed to be deaf, and then he would have these fits and he broke up things in the house at times and then he was sorry afterwards" (T. 227).

The defendant then called Thomas C. Cope as a witness (T. 241) who testified he was a high school teacher and uncle of defendant; that he observed behavior of teenage boys in his school and also the behavior of defendant, and found defendant "to be an individual of abnormal behavior" (T. 243); that:

> "I have him to do little chore jobs like raking leaves at my country place and I have found him standing with his hand on the rake and laughing and talking to himself, and I have called him and approached him until I would get within about two or three feet of him where I could tap him on the shoulder before I could

get his attention. And then when I did get his attention, he would say 'Oh, Uncle Tommy; Oh, Uncle Tommy, I am doing it.'"

"Then on one other occasion, I had him to scrub the porch. I got the hot water, gave him the soap powder and started him to scrub the porch. About ten minutes later, I came around the house to see what he was doing and he was just standing up looking and I said, 'What are you doing?' And he said, 'Oh, I am through scrubbing the porch.' Well, he hadn't even started, practically, to scrub the porch.

"On the third occasion, I had him raking up some apples in the rear portion of my orchard and he raked about a half a dozen apples and I walked around to the side of the house to observe him and I saw him motioning to something and talking and mumbling as if he was striking at something. And then I walked closer to him and he said 'Get away from here. Get away from here, you always bother me. Get away.'"

The defendant then called Dr. Katherine Beardsley as a witness who testified she was a clinical psychologist at St. Elizabeths Hospital (T. 251); that she examined defendant four times in March, 1962; that she "administered the Wechsler Scale, the Bender Gestalt, the Behn Rorschach, the Thematic Apperception Test; the house-tree-person; and the Szondi" (T. 254); that a history was available to her at the time the tests were made; that her "opinion, on the basis of my tests, the test results were consistent with a diagnosis of chronic undifferentiated schizophrenia" (T. 255); that this is a psychosis and a mental disease; that defendant had this condition in June, 1961 and September, 1961 (T. 257); that but for his mental disease at the times the offenses alleged in the indictment would not have occurred (T. 257); that she made the test results available to psychiatrists at St. Elizabeths Hospital (T. 259); that it is part of the diagnostic process for

psychiatrists; that the manual of mental disorders published by the American Psychiatric Association classifies defendant's mental disease as a psychosis (T. 260).

The defendant then called Dr. Mauris M. Platkin as a witness (T. 295) who testified he is a psychiatrist at St. Elizabeths Hospital and that a history of the defendant was taken in the hospital under the Doctor's supervision and was available to Platkin (T. 296); that he examined defendant on a number of occasions between January 8, 1962 and April 9, 1962 (T. 296); that in June, 1961 and September, 1961 the defendant was suffering from "a schizophrenic reaction, chronic undifferentiated type; that this is a psychosis and a mental disease" (T. 300); that this diagnosis was arrived at by the Doctor as follows:

> "In view of the history as presented, the collateral information for which we wrote from any sources, the interviews with various people, that is, members of his family, interviews with the patient, psychological examination, my own observations, reports from the ward as to his behavior, in view of all of these examinations and observations, it was my opinion that he was suffering from a schizophrenic reaction, chronic undifferentiated type."

The witness further testified that the foregoing is a mental disease and a psychosis; that defendant was suffering from this mental disease in June and September, 1961 (T. 301). This witness then explained the dynamics of said disease to the Court and jury and how the defendant was so affected (T. 301-305); that in the Doctor's opinion the acts alleged against defendant were the product of the defendant's mental disease (T. 304); that the defendant is now suffering from this mental disease (T. 307); that but for his mental disease the defendant would not have committed any of the acts alleged (T. 342); that the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association is the manual "by which all

hospitals and most private physicians use in establishing diagnosis", and defendant's type of mental illness is listed therein (T. 344).

The defendant then called Dr. William Novak as a witness who testified that he was "clinical director of the depart of psychiatry at the District General Hospital" (T. 346); that he examined defendant in October, 1961 in accordance with his official duties; he testified as to defendant's history; that he examined defendant approximately eight times (T. 349); that based on defendant's "history and my work with him as well as the observations of my colleagues and the conferences among us, we felt that he seemed to be having periodic psychotic episodes at that time" (T. 350); that in June and September, 1961 the defendant was suffering from "schizophrenic reaction of the undifferentiated type", and this is a mental disease (T. 350); that the acts allegedly committed by defendant were products of his mental disease (T. 352).

The defendant then called Dr. John L. Endacott as a witness who testified he was the Assistant Chief Psychologist in the Mental Hygiene Clinic in the Veterans Administration (T. 376); that prior to such employment he had many years of experience as clinical psychologist in institutions named by him, and had been a practicing psychologist for twenty-five years (T. 377); that he examined defendant and gave him tests on four different occasions, November 5, November 19 and December 3, 1961 at the D. C. General Hospital, and on March 3, 1962 at St. Elizabeths Hospital (T. 378); that such tests were Wechsler-Bellevue Adult Intelligence Scale, the Graham-Kendall Test for Organic Brain Damage, the Rorschach Test, and the Sumonds Picture Story Test (T. 378); that the tests indicated the defendant was suffering from schizophrenia, undifferentiated type (T. 379); that this is a mental disease; that the acts charged, if committed by defendant, were directly the result of the schizophrenic condition, and but for this schizophrenia the defendant would not have committed the acts (T. 380). There followed 33 pages of cross-

examination regarding the tests and the manner of giving them.

The defendant then called Dr. John V. Kavanagh as a witness who testified that he was employed by the Department of Health, Education and Welfare and that he had specialized training as a Psychiatric Social Worker; that he was formerly employed in such capacity with the United States Army and the Veterans Administration (T. 437); that he interviewed the defendant three times in the spring of 1961 at the request of Father Davis, the principal of Mackin High School because:

> "Father Davis felt that the boy was not producing the work that he should have. Teachers in classrooms were becoming alarmed because he was not paying as strict attention to the class as he might. He was laughing inappropriately at times and he just wasn't showing vitality that a boy as young and healthy as he seemed to be, should have shown."

The witness further testified that based upon his experience in the field of psychiatric social work, he felt there was something wrong with defendant, and that the defendant needed psychiatric help (T. 439).

The defendant then called Dr. Malcolm Meltzer as a witness who testified he was employed as a clinical psychologist by the Veterans Administration and by Duke University (T. 443); that he was formerly a research scientist at Georgetown University Medical Center and clinical psychologist at D.C. General Hospital; that he gave tests to the defendant on October 25, October 26, and December 4, 1961 at D.C. General Hospital as part of his official staff duties there (T. 445); that based on such tests, his opinion was that in June and September, 1961 the defendant was suffering from a schizophrenic reaction, "and that during the period such as the one described there would be times of psychosis, unrealistic thinking, poor judgment, loose associations, poor impulses control and unrealistic picture of the world" (T. 446); that it was highly

likely the defendant was suffering from a mental disease; that if the defendant committed the acts charged, it is highly likely they were caused by his mental disease (T. 447); that but for such mental disease, the defendant would not have committed such alleged acts; that he gave the defendant the Wechsler Test, the Rorschach test, the Human figure drawing test, the Thermatic Apperception Test, the Portens maze test and the Kohn test; and then there followed 20 pages of cross-examination of the manner of giving the test.

The defendant then called Dr. Dorothy S. Dobbs, staff psychiatrist, St. Elizabeths Hospital, as a witness who testified she was assigned to the maximum security division in that hospital (T. 472); that in the course of her official duties, she examined the defendant on 3 or 4 occasions other than the staff conferences between January 8, 1962 and April 9, 1962 (T. 473); that she had available a psychiatric social history of defendant, part of which she took (T. 473); that based upon the history and examinations, she was of the opinion the defendant in June and September, 1961 "was suffering from schizophrenia reaction, chronic undifferentiated, which, of course, is a mental disease" (T. 474); that this is a psychosis. She then testified to the psychodynamics of Kent's mental disease (T. 474-476); that if the acts charged were committed by defendant, they were products of his mental disease (T. 476); that on the basis of the history and findings, the defendant's mental illness in June and September 1961 was severe (T. 477). There followed many pages of cross-examination by the prosecutor, which like his cross-examination of other defense witnesses, did not change the effect of the testimony. However, it must here be noted that there was absolutely no basis in the record for the prosecutor's hypothetical questions to this witness (T. 491) based on the alleged assumption that the intruder had already taken Palmer's money "before he touched her" (T. 491, 497), and also the hypothetical question asked of this witness (T. 500-501) based on the asumption that the intruder took the

wallet in the Murphy home prior to having sexual relations with her.

The defendant then called Dr. Warren C. Johnson as a witness who testified he was a psychiatrist in private practice, a diplomate of the Board of Psychiatrists and a member of many named psychiatric organizations (T. 316); that he examined the defendant three times in 1961 in the jail and D.C. General Hospital; that he took a history from defendant and also had other clinical histories available to him (T. 518); he explained the dynamics of his examination of defendant (T. 519-521); that his opinion of defendant's mental condition in June and September 1961 was "that this person at that time was suffering from schizophrenia and that he has had a schizophrenic picture for some time and still continues to demonstrate examples of a mental disorder which we call schizophrenia; that when he examined defendant again in St. Elizabeth's Hospital on February 2, 1962 he was "more and more in the paranoid type of schizophrenic" and had been placed in "a disturbed ward" (T. 523); he then explained the dynamics of the new symptoms of defendant (T. 524-526); that if the defendant committed the crimes charged, they were the products of his mental disease (T. 528); on cross-examination this witness gave the dynamics of the defendant's mental disease (T. 549-554).

The defendant then called Dr. Bernard Levy as a witness who testified he was director of psychological services for the D.C. General Hospital (T. 560) and during the past five years he had given patients "between a thousand and two thousand psychological tests; that on September 9, 1961 he gave defendant the Rorschach test at the Receiving Home; that on the basis of this test the defendant in June and September, 1961 was suffering from "a psychotic condition, Schizophrenia, to be more exact, type, undetermined (T. 563); that if the defendant committed the crimes charged, they were the product of his mental illness, and the alleged crimes were directly related and proximately caused by the mental illness (T. 563); the witness then

gave the dynamics of the defendant's test (T. 563-564); and on cross-examination (T. 568-597).

The Court then read to the jury the following stipulation agreed to by the Government and defendant (T. 600-602):

> "The Court: Ladies and gentlemen of the jury the attorneys for the Government and for the defendant have agreed upon a stipulation about certain evidence which I am going to bring to your attention at this time.
>
> This stipulation constitutes evidence in the case and evidence for your consideration, just as if the witnesses named in the stipulation, took the witness stand and were examined and cross-examined.
>
> The stipulation is as follows: If Doctor William Hamman and Dr. James A. Ryan were called as witnesses in this case they would be recognized by the Court as experts in the field of psychiatry, as both individuals are medical doctors, specializing in the field of psychiatry.
>
> It is stipulated that Dr. Hamman would testify that he is the staff psychiatrist at St. Elizabeths Hospital, and that Dr. James A. Ryan is a staff psychiatrist at the District of Columbia General Hospital. It is stipulated between the defendant and the Government that both witnesses would testify that they had given psychiatric examinations to the defendant in the fall of 1961, and had available to them at the time of these examinations, pertinent history concerning the defendant.
>
> Both witnesses would testify that on the basis of their individual psychiatric examinations, they were of the expert opinion, to a reasonable medical certainty, that the defendant, Morris Allen Kent, Jr. was suffering from a mental disease, that is, schizophrenia of an undifferentiated type; a mental disease and considered in the classification of a psychosis.
>
> Both would testify as to their expert opinion to a reasonable medical certainty, that all of the crimes of

rape, robbery, and housebreaking if committed by the defendant, at the times and places as set forth in the indictment, were the direct product of the mental disease, that is, schizophrenia, undifferentiated type, and in their opinion, but for the presence in the defendant of this mental disease at the times and places set forth in the indictment, the defendant would not have committed the acts.

Both would testify in their expert opinion to a reasonable medical certainty that the defendant's volitional controls were substantially reduced during the times and places as set forth in the indictment, directly because of this mental disease."

The defendant then called Cornelia Dawson as a witness (T. 602) who testified she is an aunt of defendant and has known defendant all his life; that defendant was alway extremely nervous and the least little thing would upset him and make him cry; "quite distant"; that "when we would go around to visit him he would often go to his bedroom or go out in the street, or go to the basement. And he had very little to say . . . He just seemed to not want to be bothered" (T. 604); that defendant was a very poor sleeper and no control of his bowels, and would put "the excretion . . . all over his body, his neck, and his face" (T. 605); that defendant was extremely afraid of his father.

The defendant then called Mrs. Thomas Cope as a witness who testified she was defendant's aunt (T. 608) and she had known him all his life; that she lived in same house with defendant for 10 years and saw him often (T. 608); that "I noticed Morris' span of attention was very, very short. And also I noticed if the door bell rang Morris wouldn't answer it and as a matter of fact, he would say he never heard it. And if the phone would ring that didn't bother him, he didn't hear it. And when children would come around, for instance my grandchildren and other children, Morris would withdraw himself from everyone and would go in a room perhaps and darken the room and sit

alone and look in space" and in his sleep "he used to grit his teeth an awful lot at night. He talked all during his rest, and many times he would fall out of bed" (T. 608-609) that defendant had no control of his bowels whatsoever (T. 609); that defendant feared his father and would run and hide from him; that when defendant was about thirteen, she talked to the Juvenile Court authorities about his conduct and to them "I mentioned Morris' actions and I felt that Morris needed help, and it seemed to be growing worse, and I asked him while they had him there if they would give him psychiatric care, because I was most concerned about him, because he was getting worse" (T. 612); that she saw a further change in defendant's personality when he was between 13 and 16, and "Well, when he was between those times, of course, his chores, we would give him more, and he would start on something and then he would be engaged in a long conversation with someone. You would think the room was full of people. And many times I would call him and he wouldn't answer. And I would go to him and tap him on his shoulder, and I would say, Morris, and it didn't dawn on him that he hadn't finished the job. He would only do part of it, just like a child five years old. And he would think the job was well done. And he was always wanting to do something" (T. 613).

The Court then admitted in evidence a document entitled "Social Study" which is a Juvenile Court record dated 3-17, 1959, and which purports to be a social study of defendant at that time (T. 622-627), and a portion of a Juvenile Court probation report dated September 8, 1961 (T. 627); the second report states in part: "The marked duality in his pattern of adjustment suggests the rapid deterioration of his personality structure and the possibility of mental illness" (T. 628).

The defendant then called Dr. Charles E. Goshen, as a witness who testified he was Associate Professor in the Department of Psychiatry, West Virginia University School of Medicine (T. 633); that he was certified as a diplomate

by the American Board of Psychiatry and Neurology in 1948; that he examined defendant on September 16, and September 29, 1961 and in December, 1961 (T. 634); that he concluded defendent was suffering from schizophrenia, chronic undifferentiated type (T. 635); the witness then gave the dynamics of the defendant's mental illness (T. 635-642); that the crimes charged, if committed by defendant, were products of his mental disease in June and September 1961 (T. 642); the witness maintained his position on cross-examination (T. 650-658) even though the prosecutor's hypothetical question was not based on the evidence (T. 654).

The defendant then rested his case.

The prosecution then called Dr. David J. Owens as a witness in rebuttal who testified (T. 669) that he was clinical director of the maximum security unit at St. Elizabeths Hospital; that he was present at the medical staff conference in this case on April 4, 1962 (T. 671); that after he interviewed defendant and at the diagnostic staff conference he was of the opinion that defendant was suffering from a mental disease on June 5, June 12, and September 2, 1961, "schizophrenic reaction, chronic undifferentiated type" (T. 672), in his attempts to rebut "productivity", the prosecutor asked this witness a hypothetical question on the Echols counts that was not based upon admitted facts or upon facts disclosed in the record (T. 659); that the witness answered this improper hypothetical question by stating "assuming the information that you gave me, I would say that schizophrenia was not—did not cause the robbery itself". (T. 674); Q. "and how about the housebreaking? A. Probably not—I would have no opinion about the housebreaking. Q. Did, in your opinion, the chronic schizophrenia that you diagnosed cause this defendant to rape this woman? A. I would have no opinion on that" (T. 674); in his attempt to rebut "productivity" on the Palmer robbery count, the prosecutor then asked this witness a hypothetical question that was not based upon admitted facts or upon facts disclosed in the record (T. 674-

675) (especially when he asked the Doctor to assume "that he thereafter came in the apartment and he first took a wallet, a woman's purse, containing a certain amount of Gloria Palmer's money; and that after he had taken that wallet, Miss Palmer was awakened with hands over her mouth . . ."); the Doctor then answered this improper question whether the alleged robbery was caused by this disease by stating "Probably not" (T. 675); in his attempt to rebut "productivity" on the Murphy robbery count, the prosecutor then asked this witness a hypothetical question that was not based upon admitted facts or upon facts disclosed in the record (T. 675) (especially when he asked the Doctor to assume that "he went in there and took this lady's money first"); the Doctor then answered this improper question as to whether the Murphy robbery was caused by defendant's disease by stating "The robbery was probably not, assuming the information that you gave me" (T. 676). This witness then gave the dynamics of defendant's mental disease (T. 677-678), during which the following occurred:

> Q. Now doctor, will you explain to His Honor and these ladies and gentlemen of the jury, your reasons as a pyschiatrist for the opinions you have heretofore given, namely, that you saw lack of causation between your diagnosis of the disease and the robberies and your lack of ability to form an opinion as to whether or not there was a causation in regard to the three housebreakings and the two rapes?
>
> A. Well, in my opinion this patient is suffering from schizophrenia. He has a mental illness. Now as to the symptoms that were present, there were a number of symptoms of the schizophrenia that were present.
>
> Do you want me to elaborate on these or just on the causality? The difficulty that I had there?
>
> Q. No, sir. I want you to inform His Honor and the jury as fully as you can on the symptomatology and on the lack of causation and your lack of ability to

form an opinion on the causation on the rapes and the housebreakings?

A. The symptoms that were present which is one of the cardinal symptoms of schizophrenia, was the thought disturbance and the affect of the emotional disturbance, and the splitting between the two. This is where the term schizophrenia comes from.

There is a symptom that his thinking was not consistent or it did not follow the emotions of the individual. This is probably the most significant symptom of schizophrenia. The inability to probably arrive at an opinion as to productivity in this particular case is mainly based on the fact that in his symptoms there was considerable sexual preoccupation, that is difficulty with sexual thoughts, sexual ideas, and he had extreme difficulty understanding some of his sexual feelings.

Now if primary motivation for committing a crime would happen to be the sexual desires, which were involved with his illness, then this would be productivity. If the primary motivation were robbery or to get something to eat, then this would not be connected with the sexual preoccupation which was in turn a symptom of his illness.

This is the reason that I have difficulty in arriving at a firm opinion as to the productivity.

Q. Now doctor in the assumed three situations that I have given you in regard to the Echols woman, who was practically nude, and in the Gloria Jean Palmer woman, and in the Mary Murphy woman, Murphy being raped under the assumed statement of facts, does the assumed statement of facts, the fact that the robbery took place first in point of time, before the sexual acts of the two, have any significance to you as a psychiatrist?

A. Well assuming that this was the primary motivation, that he went there for to rob, that is to rob someone, this is his first interest when he got there, then this would be quite significant, meaning that he entered the building for this purpose.

On the other hand, if assuming that he did not go for this and he should have gone primarily for the sexual reasons then this would be different.

Q. If doctor, under the assumed statement of facts that I have given you in regard to the Echols lady, who was practically nude, and who was raped, and the Murphy lady, who was raped, and the Palmer woman, who was touched on the mouth, if the primary motivation in this defendant's mind for going into those three apartments, had been sexual, in other words, to attack women? In your opinion as a psychiatrist, would he have attack the women first and then taken the money, as he didn't do or would he have taken the money and then attack the women as he did do under the assumed statement of facts?

Mr. Sandground: Your Honor, I object to that question. It goes into the assumption as the primary motivation of which there is no evidence, and which the witness has said he could only speculate about. This is a hypothetical question with an assumption which is not tied in with the evidence as the primary motivation. I think it is improper.

The Court: The Court will overrule the objection. Answer the question, doctor.

A. I would say his primary motivation was robbery.

Q. Will you explain why on the basis of your last answer to my rather lengthy question that preceded it?

A. Because this is the first thing that he did. It is very simple and I can answer this is what he did first. This is assuming that this is correct, his motivation was accomplished by his first act when he entered.

On cross-examination, the Doctor testified that at the St. Elizabeths staff conference, there was unanimity of opinion that the defendant was suffering from a mental disease at the time of the commission of the crimes, that is "schizophrenic reaction, chronic undifferentiated type" (T. 681);

that this disease is considered a psychosis (T. 682); that on the basis of his examinations of defendant, he had no opinion as the causal connection between the crimes and the defendant's mental disease (T. 682-683); that the reasons for his possible change of opinion as to the causal connection between the robberies and the mental disease was answered by the Doctor as follows:

> A. I don't think it is so much a change of opinion. I think my opinion is still that I don't have a firm opinion one way or the other. However, assuming the information that Mr. Lowther gave me concerning the alleged criminal offenses, assuming that it was correct, then he the patient, I have some additional information which I was not familiar with at the time of the medical staff conference. I did not have this information from the patient. I did not have it from other sources.
>
> And I am only assuming that this is correct. If this is correct then his motivation for going to the apartments was—it could have been robbery or it could have been for sexual purposes or it is possible that it could have been for both (T. 683).
>
> Q. When you stated that in your opinion the prime motivation of the defendant on entering the apartment was for robbery, isn't this merely a speculation on your part as to the question as to what was the prime motivation and as to what was a secondary motivation?
>
> A. Well, my opinion is based on the assumed facts—now if the assumptions that I was given, if these were not correct, then certainly my opinion would be changed (T. 685).

that the witness does not know what was the prime motivation of defendant in allegedly entering any of the apartments (T. 685-686).

On redirect examination, over the objection of defendant, the prosecutor again asked the improper hypothetical questions of this witness that were not based upon

admitted facts or facts disclosed in the record ("robbery first") (T. 687-688); the Doctor then answered these improper questions as to whether the alleged robberies were caused by the defendant's mental disease by stating: "I would say that from the information that you have just given, if this is correct, then I cannot see a connection between a robbery and his illness" (T. 688).

The prosecution then called Dr. John R. Kavanagh as a witness in rebuttal (T. 689) who testified that he examined the defendant four times at the request of the United States Attorney's office (T. 690); that he decided defendant did not have a mental disease on the dates of the offenses alleged in the indictment (T. 690); that his opinion "was based on all of these examinations and depended, of course, in large measure on what he said to me" (T. 691); he then testified as to the basis for his psychiatric opinion, most of which repeat the defendant's conversations with the witness had during such examinations (T. 691-692); this witness did state the defendant was suffering from "form of sexual perversion and transvestism" (T. 700); that defendant had a nervous manifestation, "sometimes referred to as an irritable colon or spastic colon" (T. 701); the Doctor then concluded his testimony on direct examination by stating:

> Now these represent a summary of our findings. I have tried to present them to you in a way which offers to you those things which might be considered to be of a psychotic nature and indicate unsoundness of mind, such as the voices. But on the whole, I think that the history that I present here is one including the voices, which I think are quite understandable in an individual who has these tendencies. And by tendencies I mean the schizoid tendencies that he has. That they do not represent a picture which I could consider that of an individual who has an unsoundness of mind, or, in my own terms who is psychotic (T. 702).

On cross-examination, this witness testified "I hope I haven't given that impression" that defendant is a normal individual (T. 704); that defendant has a "schizoid personality" (T. 705); that in his opinion a personality disorder in which the schizoid personality would be included does not represent a disease in either the terminology used by the Court or the terminology used by psychiatrists (T. 706); that the defendant's withdrawal during the examinations of him by the witness "was one of the manifestations of the symptoms of schizophrenia" (T. 708) that some things done by defendant constitute a form of sexual perversion, and according to the classification given by the witness "it would come in the classification of sociopathic personality disturbances in which sexual perversion is a sub-variety. *So it is my opinion it would be evidence of a personality disorder rather than a disease*" (T. 710) (Emphasis supplied); that he is familiar with the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association and personality disorder was a valid classification of mental diseases and disorders when listed in said Manual (T. 710); that other conduct exhibited by defendant is also evidence of a personality disorder (T. 711); *that he would define the mental condition that he found in defendant as being that of a schizoid personality* (Emphasis supplied) (T. 716); the Doctor further testified "It is my feeling that in my examination, I did not find anything more than a schizoid personality and granted perhaps a schizoid personality may go ahead and become schizophrenic, I found no evidence of schizophrenia" (T. 718); that he would classify the schizoid personality as a personality disorder (T. 719); that it is so classified in the Statistical Manual (T. 720); that he had the aid of psychological tests given by Dr. Bernard Levy when he reached his diagnosis of defendant; that these tests indicated that the defendant was suffering from schizophrenia, undifferentiated type (T. 725).

The prosecutor then told the Court that "a man named Diamedes Puilos (not called as a witness) who lived in

apartment 507 in the Echols building and who, when interviewed, said that he was awake until the police arrived and he heard no screams (T. 727).

Both sides then rested their cases.

The defendant then again moved for a judgment of acquittal and the motion was denied by the Court (T. 730).

APPENDIX B

The revisions of the Juvenile Court Act, in no way affecting the instant case, are listed below from D.C. Code (1963):

§ 11-1551.

(a) Except as herein otherwise provided, the Juvenile Court has original and exclusive jurisdiction of all cases and in proceedings:

(1) concerning a child as defined by section 16-2301:

(A) who has violated a law, or has violated an ordinance or regulation of the District of Columbia;

(B) who is habitually beyond the control of his parent, guardian, or custodian;

(C) who is habitually truant from school or home;

(D) who habitually so deports himself as to injure or endanger himself or the morals or safety of himself or others;

(E) who is abandoned by his parent, guardian, or custodian;

(F) who is homeless or without adequate parental support or care, or whose parents, guardian, or custodian neglects or refuses to provide support and care necessary for his health or welfare;

(G) whose parent, guardian, or custodian neglects or refuses to provide or avail himself of the special care made necessary by his mental condition;

(H) who associates with vagrants, or vicious or immoral persons;

(I) who engages in an occupation, or is in a situation, dangerous to life or limb or injurious to the health or morals of himself or others;

(2) subject to applicable statutes of limitation, concerning a minor 18 years of age or older who is charged with:

(A) having violated any law; or

(B) having violated any ordinance or regulation of the District of Columbia . . .

§ 11-1553. Waiver of jurisdiction in case of felony and transfer of case.

When a child 16 years of age or over is charged with an offense which if committed by a person 18 years of age or over is a felony, or *when a child under 18 years of age is charged with an offense which if committed by a person 18 years of age or over is punishable by death or life imprisonment, a judge may, after full investigation,* waive jurisdiction and order the child held for trial under the regular procedure of the court which would have jurisdiction of the offense if committed by a person 18 years of age or over; *or the other court may exercise the powers conferred upon the Juvenile Court by this chapter* and subchapter I of chapter 23 of Title 16 in conducting and disposing of such cases. (Dec. 23, 1963, 77 Stat. 499, Pub. L. 88-241, § 1). (Emphasis supplied.)

§ 11-1586

(b) The records or parts thereof made by officers of the court pursuant to sections 11-1525 and 16-2302, referred to in subsection (a) of this section as social records, shall be withheld from indiscriminate public inspection, except that they shall be made available by rule or special order of court to such persons, govern-

mental and private agencies, and institutions as have a legitimate interest in the protection, welfare, treatment, and rehabilitation of the child under 18 years of age, and to any court before which the child may appear. The court may also provide by rule or a judge may provide by special order that any such person or agency may make or receive copies of the records or parts thereof. Persons, agencies, or institutions receiving records or information pursuant to this subsection may not publish or use them for any purpose other than that for which they were received.

(c) Whoever, except for the purposes permitted and in the manner provided by subsections (a) and (b) of this section, discloses, receives, or makes use of, or authorizes, knowingly permits, participates in, or acquiesces in, the use of information concerning a juvenile before the court, directly or indirectly derived from the records, papers, files, or communications of the court, or acquired in the course of official duties, upon conviction thereof, shall be guilty of a misdemeanor, and shall be fined not more than $100 or imprisoned not more than ninety days, or both.

(d) Prosecutions pursuant to subsection (c) of this section shall be brought in the name of the District of Columbia in the District of Columbia Court of General Sessions by the Corporation Counsel or any of his assistants. As used in this subsection, "Corporation Counsel" has the same meaning as that prescribed by section 11-1583(b).

(e) Except on order of the court, the records or proceedings in a case arising under subchapter II of chapter *23 of Title 16 may not be open to inspection by anyone other than the defendant or counsel of record.* The court, upon proper showing, may authorize the clerk to furnish certified copies of the records or portions thereof to the defendant, the mother, or custo-

dian of the child, a party in interest, or their duly authorized attorneys. The clerk may furnish certified copies of the records or portions thereof, upon request, to the United States attorney for the District of Columbia for use as evidence in nonsupport proceedings as provided by sections 11-523, 11-1556, 16-2355, and 16-2381 and to the Director of Public Health as provided by section 16-2354(a). (Dec. 23, 1963, 77 Stat. 501, Pub. L. 88-241, § 1). (Emphasis supplied.)

§ 16-2306

(a) When an officer takes a child into custody, he shall, unless it is impracticable or has been otherwise ordered by the court, accept the written promise of the parent, guardian, or custodian to bring the child to the court at the time fixed. Thereupon, the child may be released in the custody of a parent, guardian, or custodian. If not so released, the child shall be placed in the custody of a probation officer or other person designated by the court, or taken immediately to the court or to a place of detention provided by the Board of Commissioners of the District of Columbia or its authorized representative, and the officer taking him shall immediately notify the court and shall file a petition when directed to do so by the court.

(b) A child whose custody has been assumed by the court may, pending final disposition of the case, be released by the court in the custody of a parent, guardian, or custodian, or of a probation officer or other person appointed by the court, to be brought before the court at the time designated. When not released as herein provided, the child, pending the hearing of the case, shall be detained in a place of detention provided by the Board of Commissioners of the District of Columbia or its authorized representative, subject to further order of the court.

(c) This subchapter does not forbid a peace officer, police officer, or probation officer from immediately taking into custody a child:

(1) who is found violating a law or ordinance; or

(2) who is reasonably believed to be a fugitive from his parents or from justice; or

(3) whose surroundings are such as to endanger his health, morals, or safety, unless immediate action is taken.

In a case specified by this subsection, the officer taking the child into custody shall immediately report the fact to the court and the case shall then be proceeded with as provided by this subchapter and chapter 15 of Title 11. A child so taken into custody may not be held in a place of detention for a period longer than five days, excluding Sundays and holidays, unless the court orders him detained for a further period. (Dec. 23, 1963, 77 Stat. 588, Pub. L. 88-241, § 1).